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In the Supreme Court

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OF THE

United States

OCTOBER TERM, 1982

CHARLES R. HOOVER, HOWARD H. KARMAN, ROBERT D. MYERS
and HAROLD J. WOLFINGER,
Petitioners,

VS.

EDWARD RONWIN,
Respondent.

Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit

CHARLES R. HOOVER
111 West Monroe
Phoenix, Arizona 85003
(602) 262-5911
*Petitioner in Propria Persona,
and Counsel of Record for
the Remaining Petitioners*

DONN G. KESSLER
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Of Counsel

QUESTIONS FOR REVIEW

1. Petitioners were members of the Arizona Supreme Court's Committee on Examinations and Admissions. Were petitioners' acts in grading the Arizona bar examination immune from federal antitrust liability as direct action by the state itself?

2. Is this state action immunity dispelled because petitioners exercised discretion in grading the examination?

3. The Committee on Examinations and Admissions grades the bar examination and recommends to the Arizona Supreme Court that the court grant or deny admission to applicants. Are these acts immune from the federal antitrust laws under the *Noerr-Pennington* doctrine as efforts to influence official action?

4. Can a federal antitrust action be used to challenge a failing grade on a bar examination?

OTHER PARTIES BELOW¹

¹Additional parties to this case in the Court of Appeals were as follows: James L. Richmond and George Read Carlock were members of the Committee on Examinations and Admissions and stand in the same position as petitioners. D. Thompson Slutes was a member of the Committee and was named as a defendant, but apparently was never served. The State Bar of Arizona was named as a defendant, as were the wives of each of the individual defendants (Wanda Carlock, Judith Myers, Jane Doe Wolfinger, Jane Doe Richmond, Jane Doe Slutes, Jane Doe Karman and Jane Doe Hoover). The Court of Appeals affirmed dismissal of the complaint as to the State Bar and each of the wives. *Ronwin v. State Bar of Arizona*, 686 F.2d 692, 694 n. 1 (9th Cir. 1981). Petitioners do not challenge this portion of the Court of Appeals' decision.

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**Petition for Certiorari to the United States
Court of Appeals for the Ninth Circuit**

OPINIONS BELOW

The Court of Appeals' decision as amended on rehearing is published at 686 F.2d 692 and is reprinted in the Appendix. The Court of Appeals' original decision, entirely superseded by the amendment on rehearing, is published at 1981-2 Trade Cas. (CCH) ¶ 64,414.

No opinion was rendered by the United States District Court for the District of Arizona. Its order and judgment dismissing the action are reprinted in the Appendix.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its original judgment on December 14, 1981. A timely petition for rehearing and suggestion of appropriateness of rehearing en banc was filed, and rehearing was granted on July 29, 1982.

A new judgment of the Court of Appeals was entered on September 8, 1982. A timely petition for rehearing and suggestion of appropriateness of rehearing en banc was filed with respect to the new judgment. This petition was denied on December 2, 1982.

The petition for certiorari is filed within 90 days after December 2, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

United States Code, Title 15

Section 1. *Trusts, Etc., In Restraint Of Trade Illegal*

...

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Rules of the Arizona Supreme Court²

Rule 28. *Examination and Admission*

(a) The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purpose, a committee on examinations and admissions consisting of seven active members of the state bar shall be appointed by this court. . . . The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications

²The quoted Rules were in effect in 1974; the Rules presently in force contain no changes material to the issues herein.

and to fulfill the requirements prescribed by the rules of the board of governors as approved by this court respecting examinations and admissions. . . . The court will then consider the recommendations and either grant or deny admission.

(Amended effective September 15, 1970.)

...

(c)(VII)(B) The Committee on Examinations will file with the Supreme Court thirty (30) days before each examination the formula upon which the Multi-State Bar Examination results will be applied with the other portions of the total examination results. In addition the Committee will file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination.

(Amended effective January 15, 1974.)

STATEMENT OF THE CASE

Petitioners are Arizona attorneys. In 1974 they served under appointment by the Arizona Supreme Court on that court's Committee on Examinations and Admissions (the "committee").

Respondent Edward Roawin took the Arizona bar examination in February 1974. He did not receive a passing grade. The committee recommended that the Arizona Supreme Court deny him admission to the Arizona bar.

Ronwin unsuccessfully petitioned the Arizona Supreme Court to review his examination, and was denied admission. He unsuccessfully petitioned this Court for a writ of

certiorari. *Ronwin v. Committee on Examinations and Admissions*, 419 U.S. 967 (1974).³

Ronwin timely filed this action in the United States District Court for the District of Arizona, claiming federal jurisdiction under 15 U.S.C. § 15 and alleging that petitioners and the State Bar of Arizona violated section 1 of the Sherman Act by conspiring artificially to reduce the number of applicants admitted to practice in Arizona, thus restraining competition among attorneys in that state.

Allegedly, petitioners restricted admission by giving each applicant's paper a "raw score." Once these "raw scores" were known, petitioners chose a particular "raw score" as the passing grade. According to Ronwin, the number of applicants who passed thus depended on the "raw score" chosen as a passing grade "rather than [on the] achievement by each Bar applicant of a pre-set standard."

The district court dismissed Ronwin's complaint, holding that it failed to state a claim on which relief could be granted.⁴

³Ronwin again applied to take the Arizona bar examination in July 1974. The Committee denied his application, being unable to certify him to be "mentally and physically able to engage in active and continuous practice of law." After a formal hearing on the question, a (different) special committee found Ronwin mentally unfit to practice law. The Arizona Supreme Court affirmed this finding. *Application of Ronwin*, 113 Ariz. 357, 555 P.2d 315 (1976). This Court denied certiorari. 430 U.S. 907 (1977); 439 U.S. 828 (1978).

⁴The district court also held that it lacked subject matter jurisdiction and that Ronwin lacked standing to sue. It also denied Ronwin's recusal motion. The Court of Appeals affirmed the denial of recusal but reversed the other holdings. 686 F.2d at 698-700. These rulings are not challenged by this petition.

On Ronwin's appeal, the Court of Appeals reversed as to petitioners. See n. 1 above and 686 F.2d at 694 n. 1 as to other parties. The majority opinion rejected the argument that "the Committee's status as a state agent renders its actions absolutely immune from antitrust liability." 686 F.2d at 695. It held that the Committee's grading practices were not dictated by any "clearly articulated and affirmatively expressed state policy" and were not "actively supervised by the state itself," as it thought to be required by *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). 686 F.2d at 695-698.

Ferguson, J., dissented, reasoning that defendants acted as state officials in their capacity as bar examiners and were immune from antitrust liability because their acts were authorized "pursuant to a state policy to displace competition with regulation." 686 F.2d at 705-706.

REASONS FOR GRANTING THE WRIT

1. A Federal Antitrust Action Cannot Be Used to Challenge a Failing Grade on a Bar Examination

As this Court has held, "the regulation of the activities of the bar is at the core of the State's power to protect the public. . . . 'The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts."' [Citation.]" *Bates v. State Bar of Arizona*, 433 U.S. 350, 361-362 (1977).

Recognizing "the importance of leaving States free to select their own bars," *Konigsberg v. State Bar of California*, 353 U.S. 252, 273 (1957), this Court and all lower federal courts have traditionally refrained from reviewing

state bar admissions decisions except within an exceedingly narrow constitutional ambit. *See, Theard v. United States*, 354 U.S. 278, 281 (1957).

As the Ninth Circuit has held elsewhere:

Admission of applicants to the bar of a state is a matter of local concern. . . . The only constraints on the states' exclusive jurisdiction are constitutional in nature: a person may not be excluded from the practice of law in a manner or for reasons which contravene the Fourteenth Amendment, nor can the state court impose qualifications which lack "a rational connection with the applicant's fitness or capacity to practice law." [Citation.]

Brown v. Board of Bar Examiners, 623 F.2d 605, 609 (9th Cir. 1980).

Even when constitutional challenges to bar admissions practices have been raised, the federal courts have been reluctant to interfere. The constitutionality of bar admissions practices is determined by the relatively lax "rational relationship" test. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957); and see, *Tyler v. Vickery*, 517 F.2d 1089, 1099 (5th Cir. 1975), cert. denied, 426 U.S. 940 (1976); *Chaney v. State Bar of California*, 386 F.2d 962, 964 (9th Cir. 1967), cert. denied, 390 U.S. 1011 (1968). The lower federal courts will not entertain even constitutional attacks on individual state bar admissions decisions; constitutional infirmities in a state's denial of admission to an individual applicant may be redressed only on a petition for writ of certiorari to this Court. *Brown v. Board of Bar Examiners*, supra, 623 F.2d at 609-610; *Doe v. Pringle*, 550 F.2d 596, 597-599 (10th Cir. 1976), cert. denied, 431 U.S. 916 (1977). Nor have the lower federal courts

permitted disappointed bar applicants to circumvent this rule by pleading a civil rights action under 42 U.S.C. § 1983. *Doe v. Pringle, supra*, 550 F.2d at 599.

The Court of Appeals' decision in this action overturns at a single stroke this long-established body of law which ensures state control over bar admissions. The holding in this case lets any disappointed bar applicant have a lower federal court and jury review his failing grade.

It is immaterial that Ronwin has sued petitioners, the bar examiners, rather than the Arizona Supreme Court. Like the high courts of all American jurisdictions, the Arizona Supreme Court now delegates to bar examiners the technical aspects of testing, grading and screening bar applicants. *The Bar Examiners' Handbook*, 15-16 (S. Duhl 2d ed. 1980); F. Klein, S. Leleiko & J. Mavity, *Bar Admission Rules and Student Practice Rules*, 30-33 (1978). In Arizona, however, as in each of the other American jurisdictions, the highest state court retains the ultimate power and authority to grant or deny admission. Bar examiners recommend; the high court decides. *See, Feldman v. State Board of Law Examiners*, 438 F.2d 699, 702 (8th Cir. 1971); *Application of Levine*, 97 Ariz. 88, 397 P.2d 205, 207 (1964); Ariz. Sup. Ct. Rule 28(a). A suit against bar examiners who assist the state supreme courts in the admissions process is the type of collateral attack on individual admission decisions which the lower federal courts have routinely rejected until now.

To subject the grading of bar examinations to federal antitrust review imperils the entire existing system of bar admissions. It will prevent the state supreme courts from delegating the testing, grading and screening function to

senior lawyers who have been serving voluntarily as bar examiners.

If this decision stands, the states' authority over the admissions process will yield to the overriding authority of the federal courts. Jurors, not judges or bar examiners, will have the last word on the fairness of bar examinations and the grading of each applicant's papers. Disappointed bar applicants are sure to seize the opportunity to prove to a jury that their examiners were wrong. The federal courts will, consequently, be clogged with new antitrust actions after each state bar examination.

Federal antitrust scrutiny of state bar examination practices will destroy the highly developed and professionalized bar admissions process. It will seriously disrupt the proper relationship between the state and federal courts.

At a time of widespread complaint that lawyers are insufficiently prepared and qualified,⁵ the Court of Appeals' decision in this case would deprive the state courts of their best tool for assuring lawyer competence. This is exceptionally poor social policy. It is also wrong, since the Court of Appeals' opinion is based on a misreading of this Court's decisions on state action immunity from the federal antitrust laws and conflicts with the decisions of other courts of appeal.

⁵See, e.g., Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 Fordham L.Rev. 227 (1973); Maddi, *Trial Advocacy Competence: The Judicial Perspective* (1978) A.B.F. Research J. 105; *Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts* (1979), reprinted at 83 F.R.D. 215.

2. Grading Bar Examinations Is Action By the State Itself, Immune from the Antitrust Laws

a. The Midcal Test Does Not Apply to Action by State Agencies

The Court of Appeals' majority opinion reached the wrong answer in this case in large part because it asked the wrong question. The majority held that petitioners could claim state action immunity from the antitrust laws only by showing that "the challenged restraint [was] clearly articulated and affirmatively expressed as state policy and [that it was] actively supervised by the state itself." 686 F.2d at 696. This formula is a paraphrase of the test restated and applied by this Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (hereafter the "*Midcal* Test").

The Court of Appeals made a basic error by applying the *Midcal* Test to this case. That test is appropriately used *only* in antitrust cases challenging acts by political subdivisions below the state level, *e.g.*, *City of Lafayette, La., v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Community Communications Co. v. City of Boulder, Colo.*, 455 U.S. 40 (1982), or acts by private persons which have been directed, passed upon, submitted to or regulated by a state agency, *e.g.*, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, *supra*.

As the dissenting Circuit Judge pointed out, the *Midcal* Test is *not* appropriately applied in antitrust cases challenging acts by state agencies or officials. 686 F.2d at 705-

706. In such cases, the court looks only to see whether the "anticompetitive conduct [is] engaged in as an act of government by the State as sovereign . . . pursuant to state policy to displace competition with regulation." *City of Lafayette, La., v. Louisiana Power & Light Co., supra*, 435 U.S. at 413 (plurality opn.). "An adequate mandate for state anticompetitive activity exists when it is found, from authority given a [state] governmental entity to operate in a particular area, that 'the kind of action complained of' was contemplated. [Citation.]" 686 F.2d at 705-706 (Ferguson, J., dissenting below).

This Court observed when it first established the state action immunity that there was nothing in the language or history of the Sherman Act to suggest that the Act was intended "to restrain a state or its officers or agents from activities directed by its legislature" and noted that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker v. Brown*, 317 U.S. 341, 350-351 (1943).

Since *Parker*, this Court has consistently drawn a distinction between state agencies' acts and the acts of others. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) makes this point clearly. Distinguishing *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), this Court noted that the minimum-fee schedule challenged in the latter case had been published by a county bar association and was enforced by the state bar. 433 U.S. at 359. In *Goldfarb*, this Court had concluded that "it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent."

421 U.S. at 790, quoted at 433 U.S. at 359. But *Bates* presented a quite different situation:

In the instant case, by contrast, the challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules 27(a) and 29(a) and its Disciplinary Rule 2-101(B). That court is the ultimate body wielding the State's power over the practice of law [citations], and, thus, the restraint is "compelled by direction of the State acting as a sovereign." [Citation.]

433 U.S. at 359-360.

Bates also distinguished *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) on the same grounds:

[T]he context in which *Cantor* arose is critical. . . . *Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party. Here, the appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. [Citation.] Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision.

433 U.S. at 361; fn. omitted.

New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978) and *Community Communications Co. v. City of Boulder, Colo.*, *supra*, 455 U.S. 40 demonstrate the same distinction. In *Orrin W. Fox*, private parties initiated the restraint for their own benefit and the actor was a subordinate state agency. Its acts were immune because they

were taken under "a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom." 439 U.S. at 109. In *Community Communications*, by contrast, because the actor was not the state but a municipality, it was not immune unless it met the *Midcal* test. 455 U.S. at, 102 S.Ct. 835, 842.

The lesson of these cases is that agencies and officials of the state itself are clothed with full antitrust immunity whenever they act pursuant to a state policy to displace competition with regulation.

Subordinate political subdivisions and private parties are differently placed in the federal system. They are not themselves sovereign, and *therefore* obtain state action immunity only when they meet both prongs of the *Midcal* Test, showing that their acts were taken pursuant to a clearly articulated and affirmatively expressed state policy and were actively supervised by the state.

By imposing a *Midcal* Test requirement on petitioners, the majority of the Court of Appeals committed a fundamental error, creating a conflict with the decisions of the courts of appeals for several other circuits. *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706, 716-719 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978); *Foley v. Alabama State Bar*, 648 F.2d 355, 359 (5th Cir. 1981); and *Feldman v. Gardner*, 661 F.2d 1295, 1305-1306 (D.C.Cir. 1981), *cert. denied*, U.S., 102 S.Ct. 3483 (1982), *cert. granted on another issue sub. nom.*, *District of Columbia Court of Appeals v. Feldman*, U.S., 102 S.Ct. 3481 (1982), all hold on facts closely similar to those in the instant case that the *Midcal* Test is not properly ap-

plied to action by the state itself.⁶ As the *Feldman* decision states:

[The] tests [developed in *Parker* and its progeny] require courts to ascertain whether there is a clear articulation of state policy accompanied by active supervision by the state. This inquiry becomes necessary when an act by a subordinate government agency is at stake, for it is well settled that not everything it does is an act of the state as sovereign. There obviously is no need for any investigation of that sort when the action plainly is taken in a sovereign capacity.

* * * * *

While activity of private parties prompted by purported state policies or pursuant to state regulatory schemes, or even acts of subordinate governmental agencies, are not always entitled to the shield of the state's antitrust exemption, acts of the state in its sovereign character are invulnerable.

* * * * *

[R]egulation by a state legislature of admission to the state's bar clearly would stand on an entirely different footing, as does that activity when conducted by a state court endowed with the "ultimate" authority to do so. In either case, the regulatory act brings to bear the sovereignty of the state, and immunity from federal antitrust liability attaches.

661 F.2d at 1305-1306; fns. omitted.

⁶See also, *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 995-996 (3d Cir.) cert. denied, ... U.S. ..., 103 S.Ct. 388 (1982); *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 275-276 (9th Cir. 1982); *Areeda, Antitrust Immunity for "State Action" After Lafayette*, 95 Harv.L.Rev. 435, 438 n. 19, 445 n. 49 (1981).

b. As Members of the Arizona Supreme Court's Committee on Examinations and Admissions, Petitioners Acted as State Officials

The grading practices which petitioners adopted in their role as court-appointed members of the Arizona Supreme Court's Committee on Examinations and Admissions were their acts as state officials, exercising the sovereign power of the State of Arizona over admissions to its bar. They were therefore not required to meet the *Midcal* Test to qualify for state action immunity from the antitrust laws.

Arizona Supreme Court Rule 28(a) creates the Committee on Examinations and Admissions as an arm of that court. Each of the committee's members is appointed by the Arizona Supreme Court. Rule 28(a) specifies that the committee's function is to examine applicants and recommend to the supreme court for admission those applicants the committee deems qualified.

In performing these functions, the committee assists the Arizona Supreme Court in exercising its judicial power to grant or deny admission to the Arizona bar. *See, In re Summers*, 325 U.S. 561, 565, n. 6 (1945). Such a committee acts as "an administrative aid to the court," *Feldman v. State Board of Law Examiners*, *supra*, 438 F.2d at 702, and "perform[s] a judicial function on behalf of the [court]," *Richardson v. McFadden*, 563 F.2d 1130, 1132 (4th Cir. 1977) (Hall, J., concurring), *cert. denied*, 435 U.S. 968 (1978); *see Application of Levine*, *supra*, 397 P.2d at 207.

Petitioners were thus acting as state officials, performing an essential state function in grading the bar examination. This fact leaves no room to apply the *Midcal* Test; peti-

tioners were entitled to state action immunity from the antitrust laws.

c. Even If The Midcal Test Were Applied, Petitioners Would Be Entitled To State Action Immunity

Assuming the Court of Appeals did not err in applying the *Midcal* Test to this case, it erred in concluding the petitioners had not met both aspects of the test.

According to the Court of Appeals, petitioners did not meet the "clearly articulated and affirmatively expressed state policy" prong of the *Midcal* Test.

Like the defendants in *Goldfarb*, the defendants here have no statute or Supreme Court Rule to point to as directly requiring the challenged grading procedure.

686 F.2d at 696; fn. omitted.

This reasoning is fallacious for several reasons. First, under Arizona Supreme Court Rule 28(c)(VII)(B), the committee was required to, and did, submit its proposed formula for grading the bar examination to the supreme court and to secure that court's approval of the formula. See 686 F.2d at 697. Second, unlike the defendants in *Goldfarb*, petitioners were not acting as private individuals or organizations but as state officials, members of the Arizona Supreme Court's Committee on Examinations and Admissions. While precision of regulation might be required to confer state action immunity on private individuals, such precision is not, and cannot be, required of state officials. Professor Areeda has noted:

Immunity for decisions of subordinate agencies or officials cannot depend on an explicit command from the legislature; delegation of governmental powers

necessarily includes the discretion to make decisions not compelled by the legislature.

Areeda, *supra* n. 4, 95 Harv.L.Rev. at 445 n. 49.

If the committee is to serve its function of assisting the Arizona Supreme Court, that court must be able to delegate tasks and discretion to the committee without thereby stripping committee members of their state action immunity.

Third, the Court of Appeal's opinion misconceives the purpose of the "clearly articulated state policy" requirement. The purpose of that requirement is to assure that the state has conscientiously considered and specifically decided to "displace unfettered business freedom with regulation" in a particular area of commerce. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, *supra*, 439 U.S. at 109. The standard does not require the state to specify each particular detail of the acts necessary to carry out its regulatory scheme. It need only be shown that the challenged restraint is necessary to the successful operation of the regulatory scheme the state has established, and that the state has consciously determined to remove the area from free competition. *City of Lafayette, La., v. Louisiana Power & Light Co.*, *supra*, 435 U.S. at 415.

The Arizona Supreme Court has plainly removed the area of admission to practice law from "unfettered business freedom." Arizona Supreme Court Rule 28(a) shows the court's considered determination to regulate bar admissions, in part through the committee. That is all that *Midcal's* first prong requires.

The *Midcal* Test also requires a showing of active supervision by the state itself. It is unclear why the Court of Appeals thought petitioners had not met this requirement. 686 F.2d at 697.

Since the Committee on Examinations and Admissions is a state agency, its own acts fulfilled the active state supervision requirement. Moreover, each of its acts was subject to active review by the Arizona Supreme Court. Under Arizona Supreme Court Rule 28(c)(VII)(B), the court reviewed and approved the committee's formula for grading the bar examination. Under Rule 28(a), that court reviewed and acted upon the committee's recommendations to grant or deny admission to the bar.⁷ More active state supervision is difficult to imagine.⁸

Thus, even under the inapplicable *Midcal* Test, petitioners were entitled to state action immunity.

⁷Arizona Supreme Court review is active. The court does not rubberstamp the committee's recommendations, but carefully considers them. The committee's recommendations are not always accepted. See, e.g., *Application of Klahr*, 102 Ariz. 529, 433 P.2d 977 (1967); *Application of Guberman*, 90 Ariz. 27, 363 P.2d 617 (1961); *Application of Courtney*, 83 Ariz. 231, 319 P.2d 991 (1957).

⁸Absurd results follow from use of the *Midcal* Test to analyze the antitrust immunity of the state's own agencies. A district court has just sustained a post-*Ronwin* immunity claim of a state agency, noting:

"To ask if the state controls and reviews the DOT is to simply ask if the state exercises and governs over its own actions.

• • • The tautology is complete. The DOT, as an agent and instrumentality of the state, is controlled and reviewed constantly by the state. Since the DOT accounts directly to the state, and the state, is merely acting through its agent, who performs and controls the action, this court can hardly imagine

3. The Noerr-Pennington Doctrine Immunizes Petitioners' Recommendations Regarding Bar Admissions

The Court of Appeals' decision reinstating Ronwin's antitrust complaint is erroneous for an independent reason. Petitioners' acts are constitutionally privileged against antitrust liability pursuant to the *Noerr-Pennington* doctrine.⁹

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) and succeeding cases hold that in order to protect the freedom of association, the right to petition government and other freedoms guaranteed by the Bill of Rights, bona fide efforts to obtain or influence legislative, executive, judicial or administrative actions must be immunized from antitrust liability. 365 U.S. at 137-138; 381 U.S. at 669-671; *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-511, 513 (1972).

how the *Midcal* analysis could fail to be satisfied. . . . [I]n such situations as the present case, the *Midcal* test is simply not necessary to be made. But if made, as here done, it will almost certainly be met."

Deak-Pereira Hawaii, Inc. v. Department of Transportation, State of Hawaii, No. 82-0334, . . . F.Supp. . . ., 44 A.T.R.R. p. 236 (D. Hawaii Jan. 3, 1983).

⁹The *Noerr-Pennington* issue was raised in the Court of Appeals by two amicus curiae briefs filed by the National Conference of Bar Examiners. It had not been raised in the district court and was not considered by the Court of Appeals. However, the applicability of *Noerr-Pennington* can be ascertained from the face of the complaint and the Arizona Supreme Court's rules, and it therefore can properly be raised and considered by this Court as an additional reason for affirming the district court's dismissal of the complaint. *Langnes v. Green*, 282 U.S. 531, 536-539 (1931).

Petitioners' acts as members of the Committee fell well within the scope of this immunity.

Petitioners were not authorized to, and did not, take final action on Ronwin's application for admission to the Arizona bar. Petitioners' sole function was to administer and grade the bar examination and recommend to the Arizona Supreme Court whether that court should grant or deny admission to applicants such as Ronwin. The Arizona Supreme Court, and only that court, has the power to grant or deny admission to the Arizona bar.¹⁰

Ronwin complains that for anticompetitive purposes petitioners gave his test too low a grade and for that reason recommended to the Arizona Supreme Court that he be denied admission. Those acts—grading the bar examination and recommending that the supreme court take

¹⁰Arizona Supreme Court Rule 28(a) provides:

The committee shall examine applicants and recommend to this court for admission to practice applicants who are found [qualified]. . . . The court will then consider the recommendations and either grant or deny admission.

The Arizona Supreme Court has repeatedly held that it is the committee's responsibility to consider the evidence and recommend to the court for admittance only those applicants who, in the committee's opinion, have satisfactorily established their qualifications. But "the ultimate responsibility for the admittance to the practice of law lies in the members of the Court," "using our independent judgment, de novo [to] determine whether the necessary qualifications have been shown." *Application of Levine, supra*, 397 P.2d at 207; *Application of Ronwin, supra*, 555 P.2d at 316; *Application of Klahr, supra*, 433 P.2d at 979.

specified action—could be nothing other than bona fide efforts to obtain or influence judicial action.¹¹

Like the protesting dealers in *New Motor Vehicle Bd. v. Orrin W. Fox, Co.*, *supra*, 439 U.S. at 110, petitioners merely invoked their right to governmental action in the form of a determination by the Arizona Supreme Court to grant or deny admission to particular applicants. The *Noerr-Pennington* doctrine immunizes their acts from anti-trust liability.

¹¹Ronwin made no effort to plead that petitioners' acts fell within the "sham" exception to *Noerr-Pennington*, and could not do so. Petitioners were, in fact, seeking to influence the Arizona Supreme Court's actions, and did not recommend his non-admittance to obtain an anticompetitive advantage through any other means. Of course, Ronwin's allegation of anticompetitive purpose is insufficient to place this case within the "sham" exception. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, *supra*, 365 U.S. at 139-140; *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1264 (9th Cir. 1982), petition for certiorari filed, 51 U.S. L.W. 3512 (U.S., Jan. 3, 1983, No. 82-1110).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

CHARLES R. HOOVER

111 West Monroe

Phoenix, Arizona 85003

(602) 262-5911

*Petitioner in Propria Persona,
and Counsel of Record for
the Remaining Petitioners*

DONN G. KESSLER

JENNINGS, STROUSS & SALMON

111 West Monroe

Phoenix, Arizona 85003

Of Counsel

March 2, 1983

(Appendices follow)

Appendix A

Edward RONWIN, Plaintiff-Appellant,

v.

STATE BAR OF ARIZONA, Carlock, George Read and Wanda Myers, Robert D. and Judith Wolfinger, Harold J. and Jane Doe Richmond, James L. and Jane Doe Karman, Howard H. and Jane Doe Hoover, Charles R. and Jane Doe, Defendants-Appellees.*

No. 80-5004.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 16, 1981.

Decided Dec. 14, 1981.

As Amended on Rehearing Sept. 8, 1982.

Appeal from the United States District Court for the District of Arizona.

Before FERGUSON and BOOCHEVER, Circuit Judges, and HATTER,† District Judge.

* (Petitioners' footnote) The caption reflects a clerical error by the Court of Appeals. In the District Court, Ronwin sued the State Bar of Arizona; George Read Carlock and Wanda Carlock, Husband and Wife; Robert D. Myers and Judith Myers, Husband and Wife; Harold J. Wolfinger and Jane Doe Wolfinger, Husband and Wife; James L. Richmond and Jane Doe Richmond, Husband and Wife; D. Thompson Slutes and Jane Doe Slutes, Husband and Wife; Howard H. Karman and Jane Doe Karman, Husband and Wife; and Charles R. Hoover and Jane Doe Hoover, Husband and Wife, all of whom except the Slutes (who had not been served) were appellees in the Court of Appeals.

† The Honorable Terry J. Hatter, Jr., United States District Judge for the Central District of California, sitting by designation.

HATTER, District Judge:

Ronwin sued the Arizona State Bar ("Bar") and the individual members (and their spouses) of the Committee on Examinations and Admissions of the Arizona Supreme Court ("Committee"), alleging that they had violated federal antitrust laws in grading the 1974 Arizona bar examination that Ronwin failed. The district court denied Ronwin's motion for recusal and dismissed the action for failure to state a claim, lack of jurisdiction, and lack of standing. We affirm the denial of the recusal motion, but reverse the dismissal decision as to the individual committee members¹ and remand for further proceedings.

I

FACTS

Ronwin took the Arizona bar examination in February, 1974. He was notified two months later that he had failed the examination. The Arizona Supreme Court refused to review his exam, and the United States Supreme Court denied certiorari. *See Ronwin v. Committee on Examination and Admissions*, 419 U.S. 967, 95 S.Ct. 231, 42 L.Ed.2d 183 (1974).²

¹Although the Committee is appointed by the Arizona Supreme Court from a list of nominees chosen by the Bar's Board of Governors, it is not, as such, a committee of the State Bar. Because no specific allegations of wrongdoing have been made against the Bar, the dismissal for failure to state a claim was proper as to the Bar. For the same reason, we affirm the dismissal as to the spouses of the individual committee members.

²Ronwin applied to retake the bar examination in July, 1974, but was denied permission because the Committee declined to certify that he was "mentally and physically able to engage in active and continuous practice of law." *See* Ariz.Sup.Ct.R. 28(c)(IV)(5). A special committee conducted a formal hearing regarding the alle-

Ronwin filed this antitrust action in March, 1978, alleging that defendants violated section 1 of the Sherman Act, 15 U.S.C. § 1, by illegally restricting competition among attorneys practicing in Arizona. The essence of Ronwin's complaint is that the Committee graded the exam to admit a predetermined number of persons, without reference to "achievement by each bar applicant of a pre-set standard [of competence]." For purposes of their motion to dismiss, defendants did not challenge the accuracy of Ronwin's allegations.³

At the time Ronwin took the bar exam, the Committee was authorized to determine whether bar applicants possessed the "necessary qualifications and . . . fulfill[ed] the requirements prescribed by the [Bar] board of governors as approved by [the Arizona Supreme Court]" Ariz. Sup.Ct. Rule 28(a)(1973) (amended in 1975 to create two separate committees). The Committee consists of seven active members of the State Bar who, upon the recommendation of the Bar's Board of Governors, are appointed by the Arizona Supreme Court. *Id.* As Ronwin noted in paragraph II of his complaint, the State Bar is a private

gations of mental unfitness under Ariz.Sup.Ct.R. 28(c)(XII)(D). After holding a hearing, this special committee declined to find Ronwin mentally fit to practice law. The finding of unfitness was affirmed by the Arizona Supreme Court. *Application of Ronwin*, 113 Ariz. 357, 555 P.2d 315 (1976), *cert. denied*, 430 U.S. 907, 97 S.Ct. 1178, 51 L.Ed.2d 583 (1977).

³On remand, however, it may be necessary to determine the manner in which the 1974 examination was graded. Specifically, the court should determine whether the examination was graded as Ronwin alleges, or was graded on a different basis, such as a "scaled" formula, designed to equalize the difficulty of the exam over various years with the pass-fail determination being based on individual merit rather than numerical quota.

entity to which all Arizona lawyers belong, and the individual defendants were members of "the Committee . . . and, as such, presided over and conducted the process by which applicants for membership in [the] Bar were examined. . . ."

II

DISMISSAL OF RONWIN'S ACTION

The district court gave three reasons for dismissing the action: (1) the complaint failed to state a claim upon which relief could be granted; (2) the court lacked jurisdiction over the subject matter; and (3) Ronwin lacked standing to seek the relief requested. These reasons will be discussed seriatim.

A. *Failure to State a Claim—State-Action Immunity*

The district court's ruling that Ronwin had failed to state a claim was apparently based on its acceptance of defendants' argument that bar grading procedures are immune from federal antitrust laws. Relying primarily on *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the defendants argue that, even assuming, *arguendo*, the grading formula was anticompetitive, the Committee's status as a state agent renders its actions absolutely immune from antitrust liability. We disagree.

In *Bates*, the Supreme Court held that a disciplinary rule adopted by the Arizona Supreme Court and enforced by the Arizona state bar, which prohibited lawyers from advertising, did not violate the federal antitrust laws under the state-action exemption first announced in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

433 U.S. at 359-61, 97 S.Ct. at 2696-97. The Court stressed that the real party in interest was the Arizona Supreme Court because it had adopted the challenged restraint. Because the challenged restraint had been specifically adopted by the state acting, through the State Supreme Court, as sovereign, it therefore reflected a clear and affirmative articulation of state policy. *Id.* at 361-62, 97 S.Ct. at 2697-98. In the present case, by contrast, the challenged restraint was not adopted or directly authorized by the Arizona Supreme Court.

In a more analogous case, the Supreme Court held that the activities of a county and a state bar association in publishing and enforcing a minimum-fee schedule were not shielded by the state-action exemption. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-92, 95 S.Ct. 2004, 2013-15, 44 L.Ed.2d 572 (1975). The Court stated:

The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman act was not meant to proscribe is whether the activity is required by the State acting as sovereign. *Parker v. Brown*, 317 U.S. at 350-352 [63 S.Ct. at 313-14]; *Continental Co. v. Union Carbide*, 370 U.S. 690, 706-07 [82 S.Ct. 1404, 1414-15, 8 L.Ed.2d 777] (1962). Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or

require the type of price floor which arose from respondents' activities. . . . It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

Id. at 790-91, 95 S.Ct. at 2014-15.

Subsequent Supreme Court decisions underscore the distinction between *Bates* and *Goldfarb*. The Court has repeatedly emphasized in these more recent decisions that for the state-action exemption to apply the challenged restraint must be clearly articulated and affirmatively expressed as state policy and be actively supervised by the state itself. *See, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410-13, 98 S.Ct. 1123, 1135-36, 55 L.Ed.2d 364 (1978); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 411, 58 L.Ed.2d 361 (1978); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980); *Community Communications Co. v. City of Boulder*, U.S., 102 S.Ct. 835, 839-41, 70 L.Ed.2d 810 (1982). The failure to meet either requirement precludes application of the antitrust immunity. *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943.

Viewing the present case at this stage of the proceedings in light of the Court's state-action requirements, we conclude that the challenged grading procedure fails to qualify for antitrust immunity. It has not been established that the alleged restraint was "clearly articulated and affirmatively expressed as state policy," *Midcal's* first require-

ment. *Id.* Like the defendants in *Goldfarb*, the defendants here have no statute or Supreme Court Rule to point to as directly requiring the challenged grading procedure.⁴ See 421 U.S. at 790-91, 95 S.Ct. at 2014-15.

The fact that the Arizona Supreme Court has delegated to the Committee the general authority to examine applicants to determine if they are qualified to practice law and reviews the Committee's recommendations regarding admission does not alone clothe the Committee's unilateral grading policies with blanket immunity from the antitrust laws. "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement" over actions of the Committee that were not affirmatively expressed as state policy by the Arizona court. *Midcal*, 445 U.S. at 106, 100 S.Ct. at 943. As the Court emphasized in *Goldfarb*, "[i]t is not enough that, as the . . . Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U.S. at 791, 95 S.Ct. at 2015. *Accord*, *Phonetele, Inc. v. American Telephone and Telegraph Co.*, 664 F.2d 716, 736 (9th Cir. 1981).

The fact that the Committee was established by Supreme Court Rule and composed of members selected from the Bar by the Arizona Supreme Court is not, as defendants

⁴The challenged policies in *Benson v. Arizona State Board of Dental Examiners*, 673 F.2d 272, 275-76 (9th Cir. 1982) (as amended), in contrast to this case, were explicitly mandated by statute.

assert, dispositive in itself of the state-action question.⁵ Although the defendants in the United States Supreme Court's state-action decisions were public bodies, or subdivisions of the state, that did not end the Court's analysis. The Court still looked to see whether the challenged restraints were clearly articulated and affirmatively expressed as state policy and were actively supervised by the state acting as sovereign. Thus, for instance, it was not dispositive that the restraints challenged in *Parker*, *Orrin W. Fox*, and *Midcal* were enforced, respectively, by a state commission, a state board, and a state department. 317 U.S. at 344, 63 S.Ct. at 310; 439 U.S. at 103, 99 S.Ct. at 408; 445 U.S. at 100, 100 S.Ct. at 940. In *City of Lafayette*, 435 U.S. at 408, 98 S.Ct. at 1134, a plurality of the Court expressly rejected the argument that the state-action exemption extends to "all governmental entities, whether state agencies or subdivisions of a State . . . simply by reason of their status as such." This position has since been adopted by a majority of the Court. See *City of Boulder*, U.S. at, 102 S.Ct. at 842.

The question remains whether the challenged restraint allegedly fashioned by the Committee was sufficiently "articulated" and "supervised" by the Arizona Supreme Court. Standing alone, the fact that the court established the Committee and selected its members does not affect the

⁵As in *City of Boulder* and *City of Lafayette*, "[t]his case's preliminary posture makes it unnecessary for us to consider other issues regarding the applicability of the antitrust laws in the context of suits by private litigants against government defendants . . . [or to] confront the issue of remedies appropriate against [public] officials." *City of Boulder*, . . . U.S. at . . . n.20, 102 S.Ct. at 843 n.20. Accord, *City of Lafayette*, 435 U.S. at 401-02, 98 S.Ct. at 1130-31.

reasoning underlying our conclusion that the challenged grading procedure was not clearly articulated and affirmatively expressed as state policy, *Midcal's* first requirement.

Effective January 15, 1974, 45 days before the examination Ronwin failed, the Arizona Supreme Court adopted Rule 28(c)(VII)(B) which requires the Committee to file its proposed grading formula with the Supreme Court at least 30 days before each examination. This review procedure was not brought to the attention of the district court either in the pleadings or in the papers pertaining to the motion to dismiss; nor did the parties mention it in their briefs or arguments to this court.

Defendants contend for the first time on rehearing that the Committee's grading formula "was submitted to the Court, reviewed by the Court, and accepted by the Court." In response, Ronwin has tendered to this court what purports to be the letter the Committee filed with the Supreme Court on February 8, 1974 pursuant to Rule 28(c)(VII)(B). If, as Ronwin alleges, the Committee scored the examination to admit a pre-determined number of applicants, the letter does not so advise the court. Accordingly, if the letter presented to us constitutes the submission to the Supreme Court, it cannot be the basis for a clearly articulated and affirmatively expressed state policy. Although dismissal might have been proper if the facts were as defendants now argue for the first time on rehearing, those facts were never brought to the district court's attention. Dismissal was therefore improper on the basis of the information before the district court.

Our resolution of the state-action issue is not inconsistent with this court's prior decisions in *Hackin v. Lockwood*, 361 F.2d 499 (9th Cir. 1966); *Chaney v. State Bar of California*, 386 F.2d 962 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968); and *Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980). Those decisions do not support the contention that bar grading procedures are always shielded by state-action immunity, that such procedures may be challenged only on constitutional grounds, or that the Arizona Supreme Court was the proper defendant in this case. Those cases did not involve antitrust challenges to bar grading procedures. The plaintiffs in all three cases based their claims on alleged violations of their individual constitutional rights.⁶

⁶The statement in *Brown* that "the only constraints on the states' exclusive jurisdiction [over bar admission matters] are constitutional in nature . . .," 623 F.2d at 609, refers to § 1343 actions like those at issue in *Brown*, *Hackin*, and *Chaney* because, as the *Brown* court notes in the very next sentence: "federal courts are granted jurisdiction under 28 U.S.C. § 1343 to vindicate [only] constitutional rights." This jurisdictional limitation stems from the express language of § 1343, not from the fact that the plaintiff was challenging a bar admission policy. One need look no farther than *Goldfarb*, where the Court held that the minimum-fee schedule enforced by the state bar violated § 1 of the Sherman Act, to see that Ronwin's complaint established subject-matter jurisdiction under federal antitrust laws.

Similarly, a careful reading of the three decisions reveals that they do not hold that a state supreme court is the only proper defendant in challenges to bar grading procedures. As the court explained in *Brown*, the state supreme court is the proper party when it has promulgated the specific challenged rule. 623 F.2d at 608 n.6.

In *Hackin*, as the *Brown* court noted, the court emphasized that the admission rule at issue, barring graduates of unaccredited law schools from taking the bar exam, was directly promulgated and enforced by the state supreme court. 361 F.2d at 500-01. In *Chaney*,

The national policy in favor of competition, *Midcal*, 445 U.S. at 106, 100 S.Ct. at 943, should not be thwarted absent a clear articulation by the Arizona Supreme Court that it had adopted the alleged grading policy. Absent such a declaration, Ronwin should not have been denied the opportunity to prove that the grading policy was designed to limit competition among Arizona attorneys, as opposed to being designed to ensure that attorneys had the necessary qualifications. Thus, Ronwin's action should not have been dismissed on the ground that the defendants enjoy absolute state-action immunity.

B. *Subject Matter Jurisdiction—Interstate Commerce*

The Sherman Act's requirement of interstate commerce, 15 U.S.C. § 1, is jurisdictional. See *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.), cert. denied, 449 U.S. 869, 101 S.Ct. 205, 66 L. Ed.2d 88 (1980); see generally *McLain v. Real Estate Board*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980). The district court evidently found that the alleged restraint did not affect interstate commerce so as to invoke jurisdiction under the Sherman Act. Defendants contend that the jurisdictional requirement of the Sherman Act was not satisfied by Ronwin's complaint because bar admission is a purely local matter. Ronwin responds that the services

the court's discussion clearly concerns finality and the nature of the plaintiff's claim, and has no relevance to the issues of state action or proper parties. See 386 F.2d at 966-67. It should also be noted that the *Chaney* court discusses the plaintiff's restraint of trade contention (similar to Ronwin's claim) at length, and rejects it on factual rather than jurisdictional grounds. *Id.* at 965. Thus, these decisions offer no support for the contention that there is a blanket rule making state supreme courts the only proper defendants in all bar admissions cases.

of Arizona lawyers are required by people living outside Arizona. The price paid by these out-of-state clients for legal services performed by Arizona lawyers is, according to Ronwin, higher than it would be if the number of Arizona lawyers had not been artificially restricted.

In order to establish jurisdiction under the antitrust laws, a plaintiff must establish that the defendant's activity either (1) is itself *in commerce* or (2) "has an *effect on* some other appreciable activity demonstrably in *interstate commerce*." *McLain*, 444 U.S. at 242, 100 S.Ct. at 509 (emphasis added). Because of the past confusion surrounding these tests, we will consider Ronwin's allegations of interstate commerce under both the "in commerce" and the "effect on commerce" tests. See *Bain v. Henderson*, 621 F.2d 959, 960 n.1 (9th Cir. 1980).

(1) *The "in commerce" test*: The most applicable Supreme Court decision applying the "in commerce" test is *Goldfarb v. Virginia State Bar*, 421 U.S. at 783-86, 95 S.Ct. at 2011-12. In *Goldfarb*, plaintiffs alleged that the Virginia State Bar was fixing the prices charged by lawyers handling real estate transactions. In upholding jurisdiction, the Court noted that the real estate transactions that require legal services are frequently interstate transactions. 421 U.S. at 783-84, 95 S.Ct. at 2011-12. The Court reasoned that any restraint on those services therefore had a substantial effect on interstate commerce. *Id.* at 785, 95 S.Ct. at 2012.

Ronwin did not specifically plead which interstate transactions require legal services. See *Bain*, 621 F.2d at 961. Nor did he indicate how substantial an effect on interstate commerce results from restricting the number of lawyers

practicing in Arizona. It is not inconceivable, however, that he could establish that legal services constitute an indispensable and inseparable component of certain interstate transactions. Therefore, the district court erred in dismissing the complaint for that reason at this stage of the proceedings. See *McLain*, 444 U.S. at 246, 100 S.Ct. at 511 (a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief).

(2) *The "effect on commerce" test*: In *McLain*, plaintiffs charged that various New Orleans-based real estate brokers were engaged in a price-fixing conspiracy. The Court held that plaintiffs had alleged facts sufficient to show that defendants' conduct affected interstate commerce.⁷ *McLain*, 444 U.S. at 245, 100 S.Ct. at 510. Specifically, the Court noted indications in the record that: (1) "an appreciable amount of commerce [was] involved in the financing of residential property in the Greater New Orleans area" and the commerce involved various interstate institutions, *id.* at 245, 100 S.Ct. at 510; and (2) the activities of the real estate brokers, by affecting the terms and frequency of local real estate transactions, could have a "not insubstantial effect on interstate commerce." *Id.* at 246, 100 S.Ct. at 511.

Ronwin did not allege either that there are an appreciable number of interstate transactions taking place in Arizona that require legal services or that limiting the

⁷The Court specifically stated that a party need only show that a defendant's general business, as opposed to the alleged illegal conduct, affected interstate commerce in order to meet the jurisdictional requirement. *McLain*, 444 U.S. at 242, 100 S.Ct. at 509.

number of lawyers has a not insubstantial effect on the number or size of these transactions. However, as is also true under the "in commerce" test, it is not inconceivable that Ronwin could establish jurisdiction under the "effect on commerce" test. *See, e.g., McLain*, 444 U.S. at 245-47, 100 S.Ct. at 510-11; *Western Waste Service*, 616 F.2d at 1097-99. Therefore, on remand, the district court should give Ronwin the opportunity to prove that his complaint meets the jurisdictional requirements under either of these tests.

C. *Standing*

In order to have standing to maintain a private antitrust action, a party must allege injury to the party's business or property occurring by reason of the alleged antitrust violation. 15 U.S.C. § 15; *Solinger v. A&M Records, Inc.*, 586 F.2d 1304, 1309 (9th Cir. 1978), *cert. denied*, 441 U.S. 908, 99 S.Ct. 1999, 60 L.Ed.2d 377 (1979). Defendants contend that even if they committed an antitrust violation, the violation did not cause Ronwin injury because he was subsequently found mentally unfit to engage in the practice of law. Thus, according to defendants, even if Ronwin had passed the exam, he would not have been admitted to practice in Arizona.

The flaw in the defendants' argument is that Ronwin was not found mentally unfit to practice law by the Arizona Supreme Court until July of 1976, twenty-seven months after Ronwin's exam results were released.⁵ If Ronwin had

⁵Although the Committee on Examinations and Admissions declined to certify that Ronwin was "mentally fit" to practice law when he applied to retake the bar exam in July, 1974, and the special committee appointed by the Arizona Supreme Court upheld

passed the exam, he arguably would have been able to practice law until he was found, by final decision, to be mentally unfit. Because defendants' alleged illegal restraint precluded Ronwin from practicing law in Arizona for an appreciable period of time, Ronwin has sufficiently alleged that he was injured by reason of an unlawful practice. See *Kapp v. National Football League*, 586 F.2d 644, 648 (9th Cir. 1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). Cf. *Solinger*, 586 F.2d at 1311 (prospective purchaser of company has standing to sue companies that allegedly foreclosed his ability to enter market). Although his allegations of damages suffice to confer standing, Ronwin will still have to prove that defendants' actions caused him actual damages in order to recover.⁹

that determination on January 21, 1975, it was not until July, 1976 that the Arizona Supreme Court affirmed the finding. *Application of Ronwin*, 113 Ariz. 357, 555 P.2d 315 (1976), *cert. denied*, 430 U.S. 907, 97 S.Ct. 1178, 51 L.Ed.2d 583 (1977). Defendants do not contend either that Ronwin would have been denied admission in 1974 because of his alleged unfitness to practice had he passed the exam or that he would not have been allowed to practice law pending the Arizona court's decision on the matter. It would be inappropriate for this court to speculate on the matter.

⁹Assuming that Ronwin is able to clear the various hurdles still before him, it may be necessary to determine whether he would have passed the bar examination if graded on a proper basis. If the 1974 bar exam may still be impartially regraded to ascertain whether Ronwin would have received a passing grade, but for the alleged improper method of restricting bar admission, the district court may so order and supervise such a procedure for the sole purpose of determining whether Ronwin has been damaged. If the court decides that such a remedy is no longer feasible under the circumstances of this case, it would be justified in presuming that he would have passed for the purpose of ascertaining damages, if any. The amount of damages would be limited to Ronwin's loss of earnings, between April, 1974 when he would have been admitted to the Bar, and July, 1976, when the Arizona Supreme

III

THE RECUSAL QUESTION

Ronwin appeals the denial of his recusal motion. The district judge was also presiding at that time over other actions in which Ronwin was a party. Ronwin set forth, in various affidavits and motions, facts which he contends indicated that the judge was biased and prejudiced against him. He contends that the judge was therefore required to recuse himself pursuant to 28 U.S.C. §§ 144 and 455.¹⁰

The test for disqualification is the same under sections 144 and 455(b)(1). *United States v. Sibla*, 624 F.2d 864,

Court found him unfit to practice law. See *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1260 (9th Cir. 1981) (special solicitude for proof of damages when defendant's conduct has been a factor in speculative nature of damages), *cert. denied*, ... U.S. ... , 102 S.Ct. 1713, 72 L.Ed.2d 135 (1982).

¹⁰28 U.S.C. § 144 provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Under this section, the district judge must accept the truth of the factual assertions in the affidavit and determine only whether the affidavit is legally sufficient. See *United States v. Azhocar*, 581 F.2d 735, 739 (9th Cir. 1978), *cert. denied*, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979).

867 (9th Cir. 1980). That test is whether "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Winston*, 613 F.2d 221, 222 (9th Cir. 1980). In evaluating a judge's impartiality, the bias or prejudice "must stem from an *extrajudicial source*." *Azhocar*, 581 F.2d at 739 (emphasis in original). We review the denial of a recusal motion for abuse of discretion. *Sibla*, 624 F.2d at 868-69.

Ronwin's specific allegations of bias or prejudice involve judicial acts which the district judge either performed or failed to perform while presiding over the other actions in which Ronwin was a party. None of these actions involved extra-judicial acts which would indicate, on their face, prejudice or bias. Adverse rulings by themselves do not constitute the requisite bias or prejudice. *Azhocar*, 581 F.2d at 738-39. Ronwin also contends that the judge was prejudiced against him because the judge was a defendant in an action brought by Ronwin. However, "[a] judge is not disqualified merely because a litigant sues or threatens to sue him." *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977), *cert. denied*, 435 U.S. 954, 98 S.Ct. 1586, 55 L.Ed.2d 806 (1978). Such an easy method for obtaining disqualification should not be encouraged or allowed.

28 U.S.C. § 455 provides, in part, that:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party

Finally, Ronwin contends that the judge's alleged participation in *ex parte* communications with defense counsel indicated the judge's prejudice. Although a judge is generally required to accept the truth of the factual assertions in an Affidavit of Bias filed pursuant to 28 U.S.C. § 144, *Azhocar*, 581 F.2d at 739, Ronwin's allegation of *ex parte* communications relates to facts that were peculiarly within the judge's knowledge.¹¹ Given the judge's emphatic denial of Ronwin's allegations, and Ronwin's failure to show how such alleged communications indicated the judge's prejudice, the judge did not abuse his discretion by denying Ronwin's motion.

IV CONCLUSION

We conclude that the district court did not abuse its discretion in denying the motion for recusal. We also conclude, however, that the court erred in dismissing the action as to the individual Committee members, and remand for further proceedings consistent with this opinion.¹²

AFFIRMED in part; REVERSED in part, and REMANDED.

¹¹Ronwin's allegation of *ex parte* communication between the judge and defense counsel was based on the fact that the counsel, in setting a hearing date on defendants' motion to dismiss, knew when the judge would be in Phoenix. According to Ronwin, counsel could only have obtained that knowledge through *ex parte* communications with the judge. Counsel explained, however, that he knew the judge would be in Phoenix on the day he suggested for a hearing because he had received an order from the court in another case assigned to the judge setting the same date for a hearing in the other case.

¹²We note that many of the remaining issues may be suitable for resolution by means of summary judgment.

FERGUSON, Circuit Judge, dissenting:

It is now the law in this circuit that a person who has been judicially determined to be mentally unable to engage in the practice of law in the State of Arizona may still maintain a \$1,200,000 damage action under the federal antitrust laws against the Committee on Examinations and Admissions of the Arizona Supreme Court and the Committee's members¹ for failure to give him a passing grade on the state bar examination!

Precedents in this circuit and the Supreme Court mandate that when the grading procedures of the board of bar examiners are challenged, such a challenge must be brought against the state supreme court as defendant. Moreover,

¹The majority has dismissed spouses of the committee members for the perplexing reason that no specific allegations of wrongdoing have been made against the spouses. Maj. op., note 1, *ante*. However, in Arizona plaintiffs join spouses as defendants to reach their community property, not because the spouses are wrongdoers. A.R.S. § 25-215 requires that a cause of action based upon a community obligation be brought against both husband and wife. *Eng v. Stein*, 123 Ariz. 343, 599 P.2d 796 (1979). A community obligation is incurred when, for example, a husband's tort is committed in furtherance of the community's interest. *Howe v. Haight*, 11 Ariz.App. 98, 462 P.2d 395 (1969). In fact, plaintiff pleaded, "The male Defendants all acted on their own behalves and on behalf of their respective marital communities." Whether defendants actually acted on behalf of their marital communities is a question that the district court did not address and that the majority does not address. Since the case is remanded, resolution of this material issue should have been left to the district court. That plaintiff did not specifically allege that defendants' spouses are wrongdoers is wholly immaterial.

The majority's expansive interpretation of antitrust law contrasts nicely with its restrictive view of plaintiff's remedies. The effect of dismissing defendants' spouses from the action is that now plaintiff may recover only from the separate property of defendants. See *Eng v. Stein*, *supra*, 123 Ariz. at 346, 599 P.2d at 799.

because the action of the state supreme court is state action within the *Parker* exception, that action is immune to an antitrust attack. Further, the impact of the actions alleged by plaintiff are insubstantial and thus outside the antitrust laws. Consequently, I dissent from the majority's conclusion that the antitrust laws apply to this bar examination matter.

I. CHALLENGE TO DENIAL OF BAR ADMISSION.

A. *Proper Defendant*

A state's discretion over rules for admission to legal practice is vested in the judiciary, or the legislature. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). In *Hackin v. Lockwood*, 361 F.2d 499 (9th Cir.), *cert. denied*, 385 U.S. 960, 87 S.Ct. 396, 17 L.Ed.2d 305 (1966), we held that the power to grant or deny admission to the bar is vested in the Arizona Supreme Court. Hence, the State Committee on Examinations and Admissions was not a proper defendant because it was merely a committee of the Arizona Supreme Court with powers delegated by the court. *Id.* at 500.

In *Hackin*, plaintiff, the graduate of an unaccredited law school, could not take the bar because a state bar rule allowed only graduates of accredited law schools to take the bar. Plaintiff sued the justices of the Arizona Supreme Court, the State Bar of Arizona, and the Committee on Examinations and Admissions. In holding that the state bar and the Committee on Examinations and Admissions were improper defendants, the court explained:

The State Bar of Arizona is not an appropriate party to the suit because it cannot promulgate or

change the rules governing admission to practice in Arizona. Its Board of Governors can suggest rules to the Arizona Supreme Court, and can enforce them, but only with the approval of the Arizona Supreme Court.

...

In the original complaint, but not in the amended complaint, appellant names as a defendant the "Committee on Examinations and Admissions," presumably of the State Bar. This is not a committee of the State Bar, but a committee named by the Supreme Court of Arizona, made up of members of the Arizona State Bar, Rule 28(a). Thus we find the power to grant or deny admission is vested solely in the Arizona Supreme Court. . . .

361 F.2d at 499 (9th Cir. 1966).

Considering a similar admissions procedure, the court reiterated this conclusion in *Chaney v. State Bar of California*, 386 F.2d 962 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968). In that case, we held that the refusal of the State Bar Committee to certify an applicant was not a terminative step in the admissions process. Because final decision is vested in the state supreme court, the committee's decision not to admit had no "fixative" status until the court approved or rejected the Committee's recommendation. *Id.* at 966. Once a decision is final, the supreme court is the proper defendant when a party complains about examination procedures. Thus, the Committee cannot be a party because it is merely an arm of the state supreme court "for the purposes of assisting in matters of admission . . .," which matters remain ultimately in the court. *Id.* If the plaintiff is deprived of a right, it is the state supreme court, not the

Committee on Examinations and Admissions, that is the source of the deprivation.

These decisions were reaffirmed in *Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980). The Bar Examiners of Nevada were found to be an improper party for the reason articulated in *Hackin* and reemphasized in *Chaney*,² *id.* at 608. See also *Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974) (reaching similar conclusion).

The harm suffered by the plaintiff, if any, is that resulting from the Arizona Supreme Court's refusal to admit

²In *Brown*, a graduate of an unaccredited law school sued the Nevada Supreme Court, State Bar, and Board of Bar Examiners to allow her to sit for the bar. The district court dismissed the State Bar and the Board of Bar Examiners as improper parties under *Hackin*, yet issued an injunction against them. 623 F.2d at 608. In allowing the bar and the board to appeal, the court of appeals explained:

We see no logic in the district court's novel rulings which currently dismissed appellants and yet granted specific relief against them. Whatever the rationale, however, appellants should not be denied appellate review of orders by which they are aggrieved.

Id. Clearly, the court allowed the two parties to appeal because they were aggrieved. In dictum, the court said that *Hackin*, involving a challenge to the validity of a state supreme court rule governing admission to the bar, did not apply to make the state bar and the board improper defendants, since these were the only parties who could "physically comply" with an injunction requiring the defendants to let the plaintiff sit for the bar. *Id.* at 608 & 608 n.6. Even assuming the correctness of that dictum, it has no application to this case. Ronwin complains not of the failure of the state bar to seat him for the exam—he failed it—but of the failure of the supreme court to admit him. Admission to the bar is within the province of the supreme court, not the state bar, nor the committee.

him to the bar. Accordingly, Ronwin cannot sue the Committee on Examinations and Admissions of the Arizona Supreme Court.

B. *Limitations on Challenges*

Court review of state procedures for admission and testing is guided by the rational basis standard. *Chaney v. State Bar*, *supra*, at 964; *Tyler v. Vickery*, 517 F.2d 1089, 1099 (5th Cir. 1975), *cert. denied*, 426 U.S. 940, 96 S.Ct. 2660, 49 L.Ed.2d 393 (1976).³ While the discretion granted to states and bar examiners is broad, the opportunity to practice law is protected by the due process and equal protection clauses of the fourteenth amendment. *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 102, 83 S.Ct. 1175, 1179, 10 L.Ed.2d 224 (1963). *Brown v. Board of Bar Examiners*, *supra*, established a definite procedure for challenging admission practices. Noting that admission procedures are purely a matter of local concern, *Brown* stated, "The only constraints on the states' exclusive jurisdiction are constitutional in nature. . . ." 623 F.2d at 609.

³A variety of discretionary practices have been sanctioned by the courts. Statutes permitting admission without examination are valid. *Shenfield v. Prather*, 387 F.Supp. 676 (N.D.Miss.1974). A state may validly require an applicant to pass an examination in essay form. *Chaney v. State Bar*, *supra*. A state may allow state graduates to waive examination without denying equal protection to other applicants. *Huffman v. Montana Supreme Court*, 372 F.Supp. 1175 (D.C.Mont.), *aff'd*, 419 U.S. 935, 95 S.Ct. 216, 42 L.Ed.2d 172 (1974). A board of bar examiners may validly meet to review borderline failure after all scores are tabulated. *Hooban v. Board of Governors of Washington State Bar Ass'n*, 85 Wash.2d 774, 539 P.2d 686, *app. dismissed*, 424 U.S. 902, 96 S.Ct. 1092, 47 L.Ed.2d 306 (1976). Subjective grading by examiner is allowed. *Tyler v. Vickery*, *supra*.

Brown outlined the alternatives available to an unsuccessful applicant:

Since federal courts are granted jurisdiction under 28 U.S.C. § 1343 to vindicate constitutional rights, an issue arises as to the extent of a federal court's authority to participate in what is primarily a state concern. A dichotomy has developed between two kinds of constitutional attack which might be pursued by an unsuccessful bar applicant: "The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission." *Doe v. Pringle*, 550 F.2d 596, 597 (10th Cir. 1976), *cert. denied*, 431 U.S. 916, 97 S.Ct. 2197, 53 L.Ed.2d 227 (1977).

In the first type of attack, federal district courts may assert jurisdiction under § 1343 to ensure that generally applicable rules of procedures do not impinge on constitutionally protected rights. Federal courts have frequently entertained challenges to rules controlling admission to the bar, and have almost without exception sustained the validity of such rules. [Citations omitted].

On the other hand, a state court's decision on an individual application may not be disturbed in an original suit in federal district court. "[O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court . . ." *Mackay v. Nesbett*, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969). In exercising its judgment on an individual petition, a state supreme court performs a judicial act. *In re Summers*, 325 U.S.

361, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945), reviewable in the Supreme Court. See *Schware v. Board of Bar Examiners*, *supra*, 353 U.S. at 238, 77 S.Ct. at 755; *Konigsberg v. State Bar of California*, 353 U.S. 252, 258, 77 S.Ct. 722, 725, 1 L.Ed.2d 810 (1957). A federal district court, in contrast, does not sit as an appellate court and therefore lacks jurisdiction to review state court actions denying admission to the bar, even though the denial allegedly involves deprivation of constitutional rights.

Brown, *supra*, at 609-10 (citations omitted). The plaintiff in *Brown* attempted the only viable challenge to state bar admission procedures—a constitutional challenge. *Brown* denied jurisdiction because the plaintiff presented a claim of individual constitutional deprivation and the prayer for relief sought individual redress including monetary damages. Hence, the court found that the claim was not cognizable in district court. *Brown*, *supra*, at 611.

C. *The Majority Opinion*

The opinion disregards the tradition of deference to state discretion in admission procedures. Because such deference has never existed toward the state's ability to regulate fees, the majority's reliance on *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), is misplaced. Further, the opinion creates an antitrust cause of action where the only challenge that might be appropriate is a constitutional one. *Brown*, 623 F.2d at 609. Finally, *Brown* held that a federal district court does not have jurisdiction over a claim against bar examiners because the state court is the real party in interest in admission cases. In addition, jurisdiction is al-

lowed only where the suit alleges arbitrary and capricious procedures violative of due process. 623 F.2d at 610. However, the qualifications for admission in Arizona are "nearly identical" to those unsuccessfully challenged in *Brown. Id.* at 610, n.9. Because Ronwin has sued the wrong defendant and because his suit raises no constitutional challenge to admission procedures, binding precedent requires that the district court's dismissal be affirmed.

II. THE ANTITRUST EXEMPTION.

The *Parker* antitrust exemption is grounded in our federal system:

In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker v. Brown, 317 U.S. 341, 351, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943). The unfortunate effect of the majority opinion is to attribute to the Sherman Act a congressional intent to limit a state's control over bar admissions.

The proposition for which *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), stands, namely, that federal interference should not extend to essential state functions, is applicable to antitrust cases, in which Congress exercises its powers under the commerce clause. See *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 423, 98 S.Ct. 1123, 1142, 55 L.Ed.2d 364 (1977) (Burger, C. J., concurring in Part I of the Court's opinion and in the judgment); *id.* at 430, 98 S.Ct. at 1145 (Stewart,

J., dissenting). I would think that regulation of bar admissions is an "integral operation in the area of traditional government functions." *See id.* at 424, 98 S.Ct. at 1142 (Burger, C. J.). For that very reason, the Arizona Supreme Court oversees bar admissions and delegates authority to its agent. The state must have regulatory authority to examine the fitness and competence of bar applicants. If the state's agents abuse their authority, the proper remedy is a constitutional attack, not an antitrust attack that will undermine the authority that states qua states have to regulate bar admissions.

The majority applies erroneous standards to determine whether an agency of the state, that is, the Committee on Examinations and Admissions of the Arizona Supreme Court, is exempt from antitrust laws. The majority incorrectly applies a test of compulsion by asking whether the action of the Committee was *required* by the state supreme court. The majority answers: "Like the defendants in *Goldfarb*, the defendants here have no statute or Supreme Court Rule to point to as directly *requiring* the challenged grading procedure." Maj. op., *ante*, at 696 (emphasis added).

However, the test of compulsion in *Goldfarb*, *supra*, applied only to private conduct of the county bar association and to the State Bar's joinder in that private conduct. In *Goldfarb*, the private county bar association adopted a fee schedule and the State Bar, "by providing that deviation from County Bar minimum fees may lead to disciplinary action . . . voluntarily joined in what is essentially a private anticompetitive activity." *Goldfarb*, *supra*, at 791-92, 95 S.Ct. at 2015-16.

In analyzing the application of the compulsion test to the antitrust immunity of public and private defendants, Professor Areeda has wisely remarked:

The Supreme Court and lower courts have not applied the compulsion language literally. In *Midcal*, 445 U.S. 97 [100 S.Ct. 937, 63 L.Ed.2d 233] (1980), the Court defined the criteria for immunity not in terms of compulsion but in terms of supervision and articulated state policy; the emphasis on supervision implies public scrutiny, deliberation and review, but not command. *Id.* at 105-06 [100 S.Ct. at 943-44]. And in *Parker*, 317 U.S. at 346-47 [63 S.Ct. at 311-12], the anticompetitive output limitations ultimately enforced by public officials originated in proposals from the beneficiaries.

Lower courts employ the rhetoric of compulsion found in *Goldfarb* and *Cantor*, but immunize private action that is essential to a state regulatory scheme.

...

• • • • •

Compulsion is not necessary in cases of public defendants. Immunity for decisions of subordinate agencies or officials cannot depend on an explicit command from the legislature; delegation of governmental powers necessarily includes the discretion to make decisions not compelled by the legislature.

Areeda, *Antitrust Immunity for "State Action"* After *Lafayette*, 95 Harv.L.Rev. 435, 438 n.19, 445 n.49 (1981).

In the instant case, the defendants are the committee and its members, a state agency and officials acting within their general ambit of authority granted by the Arizona Supreme Court. Since the activity of public defendants is involved, the proper test for antitrust immunity is the one

found in *City of Lafayette, supra*. The plurality in *Lafayette* concluded that "the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation." *Id.* at 413, 98 S.Ct. at 1137. An adequate mandate for state anticompetitive activity exists when it is found, from the authority given a governmental entity to operate in a particular area, that "the kind of action complained of" was contemplated. *Id.* at 415, 98 S.Ct. at 1138.

Thus, the proper test to apply to the action of the Committee is one of state authorization, not one of compulsion. In deciding whether the action of the Committee was authorized, it is necessary to consider whether the Committee acted "pursuant to state policy to displace competition with regulation," *City of Lafayette, supra*, at 413, 98 S.Ct. at 1137, and whether that policy was "clearly articulated and affirmatively expressed." *Community Communications Co., Inc. v. City of Boulder*, U.S., 102 S.Ct. 835, 840, 70 L.Ed.2d 810 (1982).⁴

⁴I recognize that the majority believes an additional element of the immunity test is whether the state policy is "actively supervised by the state itself." Maj. op., *ante*, at 696. Professor Areeda, however, observes that the Supreme Court has not yet required that governmental acts be supervised by the state. Areeda, *Anti-trust Immunity for "State Action" After Lafayette*, 95 Harv.L.Rev. 435, 445 & 445 n.50.

The cases cited by the majority do not apply the supervision test to public defendants—and, of course, the Committee and its members are such defendants. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed. 2d 364 (1978), quotes the "active supervision" language of *Bates*, without applying any such test. *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 411, 58 L.Ed.2d 361 (1978), makes no mention of an "active supervision"

There can be no doubt that it was the policy of the Arizona Supreme Court—and, of course, the policy of the

test. *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980), applies the test to a *private* defendant. Finally, *Community Communications Co. v. City of Boulder*, ... U.S. ... n.14, 102 S.Ct. 841 n.14 (1982), expressly refused to reach the issue of whether active state supervision was required.

Were the *Midcal* test of "active supervision" to be extended to include public defendants, I have no doubt that the test would be satisfied in the instant case by the Arizona Supreme Court's review. *Ariz.Sup.Ct. Rule 28(a)*(1970); *Ariz.Sup.Ct. Rule 28(c)VII(B)* (1974).

The majority declares that a triable issue remains as to whether the submission made by the Committee to the supreme court pursuant to Rule 28(c) was adequate to enable the supreme court to engage in the kind of active supervision which the majority concludes is required before the state action exemption will be available.

Supreme Court Rule 28(c), as in effect at the relevant time, required the Committee to file its grading formula with the supreme court 30 days before the bar examination. As the majority notes, it apparently did not come to the attention of the district court, nor to this court until quite recently, that this rule was in effect at the time the conduct complained of by Ronwin occurred. However, this supreme court rule has the force of law, and the court can—indeed must—consider it in deciding whether the Committee's conduct was actively supervised by the court.

In addition to considering the effect of Rule 28(c), however, the majority has also given weight to evidence not presented to the district court, and indeed not presented to this court until long after oral argument, purporting to bear on the actual nature of the submission made pursuant to Rule 28(c). The record made by the parties in the district court contains no evidence whatsoever that would suggest any failure by the Committee to adequately inform the supreme court of its grading policies and procedures. I find it irregular for the court of appeals to go outside the record to decide an appeal from a dismissal by the district court. As a matter of due process, the parties have a right to have their appeal heard on the basis of the factual record assembled in the court below.

state's highest court is that of the state, see *Bates v. State of Arizona*, 433 U.S. 350, 360, 97 S.Ct. 2691, 2697, 53 L.Ed. 2d 810 (1977)—to displace competition with regulation. Indeed, any effort to limit admission to the bar will limit the open competition of the market place. As part of the regulatory scheme, the supreme court adopted a rule directing its Committee to "examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications." Rule 28(a) (1970). Surely this authorization by the Arizona Supreme Court "contemplates" that its Committee would engage in the "kind of action complained of" by plaintiff, namely, the establishment of bar admission standards and grading procedures.

The majority relies on *Goldfarb*, rather than *Bates*, *supra*, as analogous to the instant case. Though neither *Goldfarb* nor *Bates* is an exact replica of the case at hand, *Bates* is more directly on point. *Goldfarb* would be more relevant if, in the instant case, the Arizona Supreme Court had rejected the Committee's procedures; the state supreme court in *Goldfarb* had warned the state bar against enforcing the challenged fee schedules. *Goldfarb, supra*, at 789, 95 S.Ct. at 2014. In contrast, the Arizona Supreme Court approved the procedures challenged here by accepting recommendations for admission based on those procedures.⁵ This implied validation of the board's grading system renders *Bates* the more direct and proper analogy.

⁵In further contrast, the defendant in the instant case is a public defendant carrying out a state policy, whereas the defendants in *Goldfarb* were the private county bar and the state bar joining in essentially private activity. See dissent . . . *supra*.

In *Bates*, the activity of the state bar was to enforce a prohibition against advertising. There, the state bar was immune because the supreme court had promulgated the rule. The alleged anticompetitive result was to monopolize. In the instant case, the challenged activity is the grading of examinations on a curve. The state supreme court has entrusted the grading of examinations to the state bar. The alleged anticompetitive result is artificially to limit the number of attorneys and thereby to monopolize. The opinion erroneously subjects the state bar to antitrust laws by focusing on the alleged result and ignoring the immunity issue decided in *Bates*.

The majority has relied on two cases in which no antitrust immunity was found for cities charged with antitrust violations. *City of Lafayette, supra*; *City of Boulder, supra*. Those cases are inapposite, as they involve actions by cities. Such action deserves close scrutiny, as there is justifiable concern that a city may advance local, parochial interests, rather than the interests of the people of a state. The federalist compromise, of course, only provides antitrust immunity where the state's interests are concerned. In the instant case, however, an arm of the state supreme court, not a city, is doing the regulating. Moreover, the regulation concerns a matter of statewide interest—the qualifications of admittees to the bar—not a matter of local concern. The regulation of admission to the bar is at the core of the state's power to protect the public.

City of Boulder, supra, actually lends support to the position that antitrust immunity should apply in the case at hand. In explaining why antitrust immunity should not

be conferred on a city exercising home rule powers granted by the legislature, the Court in *City of Boulder* stated:

[P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State.

City of Boulder, supra, U.S. at, 102 S.Ct. at 843 (emphasis in original). By no stretch of the imagination has the Arizona Supreme Court taken a position of "neutrality" allowing the Committee to do as it pleases. To the contrary, the Arizona Supreme Court has affirmatively addressed the subject matter of this suit by granting to the Committee the power to examine applicants and to recommend for admission to the bar those who are found to have the necessary qualifications.⁶

⁶Arizona Supreme Court Rule 28(a) (1970), which assigns to the Committee the duty of screening applicants, provides in pertinent part:

The committee shall examine applicants and recommend to this Court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this Court respecting examinations and admissions. . . . The Court will then consider the recommendations and either grant or deny admission.

I am concerned that the majority, by holding that the anticompetitive action in this case was not authorized by the state and is not shielded by the state antitrust immunity, has opened wide the door to antitrust scrutiny of virtually all acts by agents and officials of the state who carry out policies of statewide concern. The foreseeable consequence of multiplication of antitrust actions accompanied by the threat of treble damages will be timorous decision-making by state officials entrusted with the public interest. The day when every act of an agent or official of the state who has been delegated power pursuant to state policy becomes subject to scrutiny for violation of the antitrust laws will be the day that our federalism has become gravely weakened.

III. ALLEGED IMPACT ON COMMERCE.

In order to prevail in an antitrust suit, a party must demonstrate an effect on commerce which is "more than trivial" in the relevant market. *Gough v. Rossmore Corp.*, 585 F.2d 381, 389 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979). Plaintiff's complaint neither identifies a relevant market nor alleges a substantial impact on such a market. A court should give a party the opportunity to demonstrate the elements of his case if his claim presents the possibility that he may prove substantial impact. However, on the facts of this case, plaintiff could not demonstrate more than the trivial impact of a curved grading system. The ability of applicants to reapply permits them to remain within the potential commerce stream.

In addition, the opinion relies on *McLain v. Real Estate Board*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980),

for the proposition that *Ronwin* could "conceivably" demonstrate impact on the relevant market. The relevant market in this case, however, while not defined before the district court, is a broad and diffuse market that is not analogous to the well-defined property market in New Orleans with a specific percentage of out-of-state contractors. Without more, the conclusion of a conceivable impact in *Ronwin* does not flow from the facts of *McLain*.

CONCLUSION

For the foregoing reasons, I dissent.

Appendix B

In the United States District Court
For the District of Arizona

NO. CIV 78-193 PHX MLR

Edward Ronwin,
Plaintiff,

vs.

State Bar of Arizona, et al.,
Defendants.

[Filed Oct. 9, 1979]

ORDER AND JUDGMENT

This cause came on to be heard before the Court on the following motions:

1. Motion of plaintiff seeking recusal of judge.
2. Motion of defendants to dismiss the complaint.

The Court, having considered the pleadings, the memoranda of points and authorities filed by the parties and the argument of counsel for defendants, plaintiff having waived his appearance and having waived oral argument on his motion seeking recusal of judge, finds as follows:

1. Plaintiff's motion seeking recusal of judge is legally insufficient.
2. The allegations of the complaint fail to state a claim upon which relief can be granted.
3. The Court lacks jurisdiction of the subject matter.
4. The plaintiff lacks standing to seek the relief requested.

Now, therefore, it is Ordered and Adjudged as follows:

1. The motion of plaintiff seeking recusal of judge is hereby denied.

2. The motion of defendants to dismiss is hereby granted.

3. The Clerk is hereby directed forthwith to enter judgment in favor of the defendants, and each of them, and against the plaintiff.

4. Defendants' costs shall be taxed pursuant to law.

Done in Open Court this 23d day of March, 1979.

United States District Judge

No. 82-1474

Office-Supreme Court, U.S.

FILED

APR 25 1983

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

CHARLES R. HOOVER, HOWARD H. KARMAN,
ROBERT D. MYERS and HAROLD J. WOLFINGER,
Petitioners,

vs.

EDWARD RONWIN,
Respondent.

Supplemental Brief Re Petition
for Certiorari to the United States
Court of Appeals for the Ninth Circuit

CHARLES R. HOOVER
111 West Monroe
Phoenix, Arizona 85003
(602) 262-5911

Petitioner in Propria Persona,
and Counsel of Record for
the Remaining Petitioners

DONN G. KESSLER
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Of Counsel

No. 82-1474

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

CHARLES R. HOOVER, HOWARD H. KARMAN,
ROBERT D. MYERS and HAROLD J. WOLFINGER,
Petitioners,

VS.

EDWARD RONWIN,
Respondent.

**Supplemental Brief Re Petition
for Certiorari to the United States
Court of Appeals for the Ninth Circuit**

On March 2, 1983, Petitioners Charles R. Hoover, Howard H. Karman, Robert D. Myers and Harold J. Wolfinger, filed their Petition for Certiorari from the United States Court of Appeals for the Ninth Circuit.

On March 23, 1983, the United States Supreme Court rendered its decision in *District of Columbia Court of Appeals, et al. v. Feldman, et al.*, 51 U.S.L.W. 4285 (No. 81-1335). In *District of Columbia Court of Appeals v. Feldman, supra*, the United States Supreme Court held that in bar admission decisions, lower federal courts "do not have

jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." 51 U.S.L.W. at 4292.

Alternatively to granting petitioners' petition for certiorari, it would appear to be appropriate for this Court to vacate the decision of the Ninth Circuit Court of Appeals and remand that decision for reconsideration in light of *District of Columbia Court of Appeals v. Feldman*, *supra*.

CONCLUSION

For these reasons, the decision of the Ninth Circuit Court of Appeals should be vacated and the matter remanded to that court for reconsideration in light of *District of Columbia Court of Appeals v. Feldman*, *supra*.

Respectfully submitted,

CHARLES R. HOOVER
111 West Monroe
Phoenix, Arizona 85003
(602) 262-5911
*Petitioner in Propria Persona,
and Counsel of Record for
the Remaining Petitioners*

DONN G. KESSLER
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Of Counsel

April 22, 1983

No. 82-1474

Office-Supreme Court, U.S.

FILED

AUG 17 1983

ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN,
ROBERT D. MYERS, and HOWARD J. WOLFINGER

Petitioners,
versus
EDWARD RONWIN,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

CHARLES R. HOOVER	EDWARD RONWIN
111 West Monroe	P. O. Box 3585
Phoenix, AZ 85003	Urbandale, IA 50322
Tel. (602)262-5911	Tel. (515)223-8819
Petitioner in	Respondent <u>pro se</u>
Propria Persona,	
and Counsel of	
Record for the	
Remaining Petitioners	

DONN G. KESSLER
JEFFERSON L. LANKFORD
Jennings, Strouss & Salmon
111 West Monroe
Phoenix, AZ 85003
Tel. (602)262-5911
Of Counsel

PETITION FOR WRIT OF CERTIORARI FILED

MARCH 2, 1983

ORDER GRANTING PETITION FOR
WRIT OF CERTIORARI

MAY 16, 1983

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CHRONOLOGICAL LIST OF RELEVANT
DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CAUSE NO. CIV 78-193 PHX MLR

<u>Date</u>	<u>Description</u>
March 13, 1978	Complaint
April 5, 1978	Answer
November 3, 1978	Defendants' Motion to Dismiss
March 23, 1979	Order and Judgment
October 12, 1979	Judgment
October 16, 1979	Plaintiff's Motion for New Trial
November 20, 1979	Order [Denying Plaintiff's Motion for New Trial]
December 20, 1979	Plaintiff's Notice of Appeal

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 80-5004

<u>Date</u>	<u>Description</u>
April 7, 1980	Appellant's Opening Brief
May 9, 1980	Appellees' [Answering] Brief
December 14, 1981	Opinion and Judgment
January 20, 1982	Appellees' Petition for Rehearing and Suggestion of Appropriateness of Rehearing <u>en banc</u>
January 29, 1982	Brief of <u>Amicus Curiae</u> National Conference of Bar Examiners in Support of Petition for Rehearing and Suggestion of Appropriateness of Rehearing <u>en banc</u>
February 12, 1982	Brief of <u>Amicus Curiae</u> State Bar of California in Support of Petition for Rehearing and Suggestion of Appropriateness of Rehearing <u>en banc</u>

- July 29, 1982 Order [Granting
Petition for
Rehearing and
Motions for Leave
to File Amicus
Curiae Briefs]
- September 8, 1982 Opinion and
Judgment
[Superseding
Opinion and
Judgment of
December 14, 1981]
- September 21, 1982 [Appellees' Second]
Petition for
Rehearing and
Suggestion of
Appropriateness of
Rehearing en banc
- September 22, 1982 Brief of Amicus
Curiae National
Conference of Bar
Examiners in
Support of Petition
for Rehearing and
Suggestion of
Appropriateness of
Rehearing en banc
- September 22, 1982 Brief of Amicus
Curiae State Bar of
California in
Support of Petition
for Rehearing and
Suggestion of
Appropriateness of
Rehearing en banc

December 2, 1982 Order [Denying
Appellees' Petition
for Rehearing and
Suggestion of
Appropriateness of
Rehearing en banc]

IN THE UNITED STATES SUPREME COURT

No. 82-1474

<u>Date</u>	<u>Description</u>
March 2, 1983	Petition and Notice of Petition for Writ of Certiorari to the United States Court of Appeals
March 23, 1983	Respondent's Brief in Opposition to Petition for Writ of Certiorari
March 30, 1983	National Conference of Bar Examiners' Motion for Leave to File Brief of <u>Amicus Curiae</u> and Brief of <u>Amicus</u> <u>Curiae</u> in Support of Petition for Writ of Certiorari
May 16, 1983	Order Granting Petition for Writ of Certiorari

EDWARD RONWIN,
 Box 2527
 Scottsdale, Arizona 85252
 Plaintiff in Propria Persona

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

EDWARD RONWIN,)
 a singleman,) NO. CIV 78-193 PHX WPC
)
 Plaintiff,)

vs.)

C O M P L A I N T

STATE BAR OF)
 ARIZONA; GEORGE) (Jury Trial Demanded)
 READ CARLOCK)
 and WANDA)
 CARLOCK,)
 Husband and)
 Wife; ROBERT D.)
 MYERS and)
 JUDITH MYERS,)
 Husband and)
 Wife; HAROLD J.)
 WOLFINGER and)
 JANE DOE)
 WOLFINGER,)
 Husband and)
 Wife; JAMES L.)
 RICHMOND and)
 JANE DOE)
 RICHMOND,)
 Husband and)
 Wife;)
 D. THOMPSON)
 SLUTES and)

JANE DOE)
 SLUTES, Husband)
 and Wife;)
 HOWARD H.)
 KARMAN and)
 JANE DOE)
 KARMAN, Husband)
 and Wife; and)
 CHARLES R.)
 HOOVER and)
 JANE DOE)
 HOOVER, Husband)
 and Wife,)
)
 Defendants.)
 _____)

COMES NOW the Plaintiff,
 EDWARD RONWIN, pro se, and for his
 Complaint against the above-named
 Defendants, alleges as follows:

JURISDICTION

I

This action arises under the
 Federal Anti-Trust Statutes, and in
 particular 15 U.S.C.A. § 1 et seq., and
 the laws of the State of Arizona.
 Jurisdiction is conferred upon this
 Court by virtue of the provisions of

15 U.S.C.A. § 15 and the principle of pendant jurisdiction. The acts and omissions hereinafter complained of occurred within the District of Arizona.

THE PARTIES

II

The Plaintiff, EDWARD RONWIN, is a domiciliary and citizen of the State of Arizona.

The Defendant, STATE BAR OF ARIZONA, is a private entity with principal offices in Phoenix, Maricopa County, State of Arizona, to which all persons licensed to practice law in the State of Arizona belong. The male Defendants, above-named, were all members of the Committee on Examinations and Admissions of the Supreme Court of Arizona at times

relevant to this action; and, as such, presided over and conducted the process by which applicants for membership in said Bar were examined to purportedly determine their ability in law so as to permit a decision on whether or not applicants were to be admitted to said Bar. The male Defendants all acted on their own behalves and on behalf of their respective marital communities; and all of the Defendants acted jointly and severally in the acts and omissions hereinafter complained of. All natural person Defendants are domiciliaries and citizens of the State of Arizona.

OPERATIVE FACTS

III


On February 27, 28 and March 1, 1974, the Defendants conducted an examination of Bar applicants, which group of applicants included the Plaintiff.

IV

Prior to said examination, the Defendants had announced that a grade of Seventy (70) was required to pass the examination.

V

In April, 1974, the Defendants announced the results of said examination and claimed that Plaintiff did not receive a passing grade of Seventy (70).



VI

The Defendants did not grade on a Zero to One Hundred (0 to 100) scale; rather, they used a "raw score" system. After the raw scores were known, the Defendants picked a particular raw score value as equal to the passing grade of Seventy (70). Thereby the number of Bar applicants who would receive a passing grade depended upon the exact raw score value chosen as equal to Seventy (70); rather than achievement by each Bar applicant of a pre-set standard.

VII

The aforesaid conduct, which the Defendants entered into as a conspiracy or combination, was intended to and did result in a restraint of trade and commerce among

the Several States by artificially reducing the numbers of competing attorneys in the State of Arizona; and, in further consequence of said conduct, Plaintiff was among those artificially prevented from entering into competition as an attorney in the State of Arizona and thereby further deprived of the right to compete as an attorney for the legal business deriving from or involving the Several States of the United States, including Arizona.

VIII

When Plaintiff complained of the unlawful behavior of the Defendants, recited above, using the procedures provided by the rules of the Supreme Court of Arizona for said purpose, the Defendants without

notice, hearing or medical examination, falsely and maliciously labelled the Plaintiff as "mentally unable to engage in the active and continuous practice of law," and, denied Plaintiff the right to take the July, 1974 Bar examination.

IX

In consequence of the behavior of the Defendants, Plaintiff has sustained and continues to sustain damages in a sum no less than FOUR HUNDRED THOUSAND and 00/100 (\$400,000.00) DOLLARS and Plaintiff is entitled to a recovery of treble said amount.

WHEREFORE, Plaintiff prays this Court for Judgment against the Defendants, jointly and severally, as follows:

1. In the amount of
\$1,200,000.00 as and for trebled
compensatory damages;

2. For Plaintiff's costs and
disbursements herein; and,

3. For such other and
further relief as to this Court seems
just and proper.

DATED this 13th day of March, 1978.

/s/Edward Ronwin
EDWARD RONWIN, in Propria
Persona

FENNEMORE, CRAIG, von AMMON & UDALL
 A Professional Corporation
 (Philip E. von Ammon)
 100 West Washington, Suite 1700
 Phoenix, Arizona 85003
 (602) 257-8700
 Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

EDWARD RONWIN,)	
a singleman,	)	NO. CIV 78-198* PHX WPC
)	
Plaintiff,)	
)	
vs.	)	ANSWER
)	
STATE BAR OF)	
ARIZONA; GEORGE))	
READ CARLOCK)	
and WANDA)	
CARLOCK,)	
Husband and)	
Wife; ROBERT D.))	
MYERS and)	
JUDITH MYERS,)	
Husband and)	
Wife; HAROLD J.))	
WOLFINGER and)	
JANE DOE)	
WOLFINGER,)	
Husband and)	
Wife; JAMES L.))	
RICHMOND and)	
JANE DOE)	
RICHMOND,)	

* The case number is incorrect and
 should be 78-193

Husband and)
 Wife;)
 D. THOMPSON)
 SLUTES and)
 JANE DOE)
 SLUTES, Husband)
 and Wife;)
 HOWARD H.)
 KARMAN and)
 JANE DOE)
 KARMAN, Husband)
 and Wife; and)
 CHARLES R.)
 HOOVER and)
 JANE DOE)
 HOOVER, Husband)
 and Wife,)
)
 Defendants.)

Defendants answer as follows:

1. Answering paragraph I,
 defendants deny this Court has
 jurisdiction over this matter and deny
 they committed any acts or omissions
 sufficient to give rise to any cause
 of action against them.

2. Answering paragraph II, defendants allege the State Bar of Arizona is an integrated bar association created and continued under the direction and control of the Supreme Court of Arizona, admit the principal offices of the State Bar of Arizona are in Phoenix, Maricopa County, Arizona, and admit that all persons licensed to practice law in the State of Arizona are required to be members of the State Bar of Arizona. Defendants admit the male defendants in this action were members of the Committee on Examinations and Admissions of the Supreme Court of Arizona in 1974 and admit said committee members were appointed to examine applicants for membership to the State Bar of Arizona and to

recommend to the Arizona Supreme Court for admission to practice those applicants found to have the necessary qualifications and to fulfill the requirements for admission, as approved by the Arizona Supreme Court. Defendants admit they are citizens of the State of Arizona, admit plaintiff is a citizen of the State of Arizona and deny the remaining allegations of paragraph II.

3. Defendants admit the allegations of paragraphs III and IV.

4. Answering paragraph V, defendants admit the results of the bar examination conducted in February and March, 1974, were announced in April, 1974, and allege plaintiff did not receive a passing grade on that examination.

5. Defendants deny the allegations of paragraphs VI, VII and IX.

6. Answering paragraph VIII, defendants admit plaintiff was denied permission to take the July, 1974 Arizona bar examination and deny the remaining allegations of that paragraph.

7. Defendants deny each allegation not specifically admitted herein.

AFFIRMATIVE DEFENSES

8. Plaintiff has failed to state a claim upon which relief can be granted.

9. This action is barred by the doctrine of judicial immunity.

10. This action is barred by the doctrine of res judicata.

11. This action is barred by the applicable statute of limitations.

12. This action must be dismissed because, if any restriction of trade occurred, it was the result of valid governmental action.

WHEREFORE, defendants demand judgment, their costs and attorneys' fees incurred herein.

FENNEMORE, CRAIG,
von AMMON & UDALL
A Professional
Corporation

By s/Ruth V. McGregor
Philip E. von Ammon
Ruth V. McGregor
100 West Washington St.
Suite 1700
Phoenix, Arizona 85003
Attorneys for Defendants

COPY of the foregoing
mailed this 5th day
of April, 1978, to:

Edward Ronwin
Box 2527
Scottsdale, Arizona 85252
Plaintiff in Propria Persona

s/Ruth V. McGregor

FENNEMORE, CRAIG, von AMMON & UDALL
 A Professional Corporation
 Philip E. von Ammon
 Ruth V. McGregor
 1700 First National Bank Plaza
 100 West Washington Street
 Phoenix, Arizona 85003
 (602) 257-8700
 Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

EDWARD RONWIN,)	
	)	NO. CIV 78-193 PHX MLR
Plaintiff,)	
	)	DEFENDANTS' MOTION
vs.	)	TO DISMISS
)	
STATE BAR OF)	
ARIZONA,)	
<u>et al.</u> ,)	
)	
Defendants.))	
<hr/>)	

Pursuant to Rule 12(b),
 Federal Rules of Civil Procedure,
 defendants move that this action be
 dismissed for failure to state a claim

upon which relief can be granted, and
for lack of jurisdiction over the
subject matter.

FENNEMORE, CRAIG,
von AMMON & UDALL
A Professional
Corporation

By /s/Philip E. von Ammon
Philip E. von Ammon
Ruth V. McGregor
1700 First National
Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003
Attorneys for
Defendants

. . . 1/

1/ Brief In Support of Motion
Excluded.

In the United States District Court
For the District of Arizona
NO. CIV 78-193 PHX MLR

Edward Ronwin,

Plaintiff,

vs.

State Bar of Arizona, et al.,
Defendants.

[Filed Oct. 9, 1979]

ORDER AND JUDGMENT

This cause came on to be
heard before the Court on the
following motions:

1. Motion of plaintiff
seeking recusal of judge.
2. Motion of defendants to
dismiss the complaint.

The Court, having considered
the pleadings, the memoranda of points
and authorities filed by the parties
and the argument of counsel for

defendants, plaintiff having waived his appearance and having waived oral argument on his motion seeking recusal of judge, finds as follows:

1. Plaintiff's motion seeking recusal of judge is legally insufficient.

2. The allegations of the complaint fail to state a claim upon which relief can be granted.

3. The Court lacks jurisdiction of the subject matter.

4. The plaintiff lacks standing to seek the relief requested.

Now, therefore, it is Ordered and Adjudged as follows:

1. The motion of plaintiff seeking recusal of judge is hereby denied.

2. The motion of defendants to dismiss is hereby granted.

3. The Clerk is hereby directed forthwith to enter judgment in favor of the defendants, and each of them, and against the plaintiff.

4. Defendants' costs shall be taxed pursuant to law. Done in Open Court this 23rd day of March, 1979.

United States District Judge

JUDGMENT ON DECISION BY THE COURT

United States District Court
FOR THE
DISTRICT OF ARIZONA

CIVIL ACTION FILE NO. 78-193 Phx

EDWARD RONWIN)	
)	
vs.	)	JUDGMENT
)	
STATE BAR OF)	
ARIZONA et al)	

This action came on to
~~trial~~ (hearing) before the Court,
Honorable Manuel L. Real, United
States District Judge, presiding, and
the issues having been duly ~~tried~~
(heard) and a decision having been
duly rendered,

It is Ordered and Adjudged
that the plaintiff take nothing and
complaint and action are dismissed.

Dated at Phoenix, Arizona,
this 12th day of October, 1979.

/s/ W. J. FURSTENAU
Clerk of Court

/s/ Dorothy Ewart
By: Dorothy Ewart, Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

EDWARD RONWIN,)	
	)	CV 78-193-PHX MLR
Plaintiff)	
)	
vs.	)	ORDER
)	
STATE BAR OF)	
ARIZONA, et al,)	
)	
Defendants.)	
_____)	

Plaintiff has moved for a new trial in the above entitled matter.

The Court having considered this matter

IT IS ORDERED the motion is denied.

DATED: November 20, 1979.

/s/
MANUEL L. REAL
UNITED STATES DISTRICT
JUDGE

Edward RONWIN, Plaintiff-Appellant,

v.

STATE BAR OF ARIZONA, Carlock, George
Read and Wanda Myers, Robert D. and
Judith Wolfinger, Harold J. and
Jane Doe Richmond, James L.
and Jane Doe Karman, Howard H. and
Jane Doe Hoover, Charles R.
and Jane Doe, Defendants-Appellees.

No. 80-5004.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 16, 1981.

Decided Dec. 14, 1981.

Appeal from the United States
District Court for the District of
Arizona.

Before FERGUSON, BOOCHEVER, Circuit
Judges, and HATTER,^{2/} District Judge.

^{2/}The Honorable Terry J. Hatter,
Jr., United States District Judge for
the Central District of California,
sitting by designation.

HATTER, District Judge:

Ronwin brought this suit contending that the State Bar of Arizona (Bar) committed an antitrust violation in its grading of the February, 1974 Arizona bar examination. The district court dismissed Ronwin's complaint and denied his motion for recusal. We reverse the district court's dismissal of Ronwin's complaint, and affirm the denial of the motion for recusal.

I

FACTS

Ronwin took the Arizona bar examination in February, 1974. Two months later, he was notified that he had failed the examination. He attempted unsuccessfully to have his

exam reviewed by the State Supreme Court.^{1/}

Ronwin applied to take the July, 1974 bar examination but was denied permission because the Bar found it was unable to certify that he was "mentally and physically able to engage in active and continuous practice of law." See* Ariz.Sup.Ct.R. 28(c)(IV)(5). The Arizona Supreme Court subsequently created a special committee to conduct formal hearings regarding allegations of mental unfitness. See Ariz.Sup.Ct.R. 28(c)(XII)(D). After holding a hearing, this special committee found

^{1/}The Arizona court refused to review his exam, and the United States Supreme Court denied certiorari. Ronwin v. Committee on Examination and
(Continued on next page)

* Words italicized in original appear underscored except for foreign words.

on January 21, 1975, that Ronwin was mentally unable to engage in the practice of law.^{1/}

In March of 1978, Ronwin filed the instant antitrust action. He alleged that the Bar illegally restricted competition among attorneys practicing in Arizona, thus violating section 1 of the Sherman Act, 15 U.S.C. § 1, by limiting the number of attorneys who receive passing grades on the bar exam

(Continued from previous page)
Admissions, 419 U.S. 967, 95 S.Ct. 231, 42 L.Ed.2d 183 (1974).

^{1/}The committee's decision was affirmed unanimously by the Arizona Supreme Court. Application of Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976), cert. denied, 430 U.S. 907, 97 S.Ct. 1178, 51 L.Ed.2d 583 (1977). In Ronwin v. Daughton, No. 77-2318 (9th Cir. August 9, 1979)(unpublished memorandum), this court concluded that the determination that Ronwin is unfit to practice law cannot be challenged in the federal courts.

in a given year. Although Ronwin refuses to use the term, his allegation apparently is that the Bar grades the exams on a "curve", i.e., it determines the number of attorneys to be admitted, and then sets the minimum passing raw score accordingly. According to Ronwin's complaint, the Bar set the curve without reference to "achievement by each bar applicant of a preset standard [of competence]."

The case was assigned to Judge Real, who was also presiding over other cases in which Ronwin was a party.^{1/} Ronwin sought Judge Real's recusal from this case, and the Bar

^{1/}Judge Real was the judge in Ronwin v. Daughton, No. Civ. 76-872 (D.Ariz. 1979), aff'd mem. No. 77-2318 (9th Cir. Aug. 9, 1979)(unpublished memorandum), and Ronwin v. Segal, No. Div. 76-924 (D.Ariz. 1977).

sought to have the case dismissed. On October 12, 1979, Judge Real entered judgment denying Ronwin's recusal motion and granting the Bar's motion for dismissal. Ronwin filed a timely notice of appeal.

II

DISMISSAL OF RONWIN'S ACTION

In his order, Judge Real gave three reasons for dismissing the complaint: (1) the complaint failed to state a claim upon which relief could be granted; (2) the court lacked jurisdiction over the subject matter; and (3) the plaintiff lacked standing to seek the relief requested. These reasons will be discussed individually.

A. FAILURE TO STATE A CLAIM

Judge Real apparently found, as the Bar contended, that, as an agency of

the state of Arizona, it is exempt from federal antitrust laws. The Bar's position is that, assuming, arguendo, it had an improper purpose, i.e., to artificially limit the number of attorneys admitted each year, its status as a state agent protects it from antitrust liability. It relied primarily on Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).

In Bates, the Supreme Court held that a disciplinary rule adopted by the Arizona Supreme Court and enforced by the Arizona state bar, which prohibited lawyers from advertising, did not violate the federal antitrust laws under the "state-action" exemption first announced in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). 433 U.S. at 359-63,

97 S.Ct. at 2696-99.^{1/} The Court indicated that the real party in interest was the Arizona Supreme Court, which had adopted the disciplinary rule. Id. at 361, 97S.Ct. at 2697. The rule was found to reflect a clear articulation of the state policy. Although enforcement was committed to a state agency, i.e., the state bar, that enforcement was subject to constant supervision by the state policymaker, the Arizona Supreme Court. Id. at 361-62, 97 S.Ct. at 2697-98. Finally, the Court stated that rules governing the behavior of attorneys affect a significant state interest. Id.

^{1/}The Court held, however, that the disciplinary rule violated the first and fourteenth amendments of the United States Constitution. Id. at 363-84, 97 S.Ct. at 2698-2709.

Unlike the situation in Bates, here: (1) a state agency, as opposed to the state policymaker, was committing the alleged anticompetitive act; and, more importantly, (2) the alleged anticompetitive act did not fulfill a clearly articulated state policy.

In a case factually closer to Ronwin's, the Supreme Court held that the activities of the county bar association and the Virginia State Bar in publication and enforcement of a minimum fee schedule was not shielded by the state action exemption from antitrust laws. Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-92, 95 S.Ct. 2044, 2013-16, 44 L.Ed.2d 572 (1975). The Court stated:

The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. Parker v. Brown, 317 U.S., [sic] at 350-352, 63 S.Ct at 313-314; Continental Co. v. Union Carbide, 370 U.S. 690, 706-707, 82 S.Ct. 1404, 1414-1415, 8 L.Ed.2d 777 (1962). here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them or require the type of price floor which arose from respondents' activities.... It is not enough that, as the County Bar puts it, anticompetitive conduct is

'prompted' by state action;
rather, anticompetitive
activities must be compelled
by direction of the State
acting as a sovereign.

Id. at 790-91, 95 S.Ct. at 2014-15.

Goldfarb has placed narrow limits on
the state action exemption of Parker.
Antitrust Adviser § 1.14, at 19
(Shepard's 2d ed. 1978). The key
inquiry is whether the state, in this
case the Arizona Supreme Court, had an
active hand in the allegedly
anticompetitive policies.

Two recent Supreme Court decisions
impart significance to the distinction
between Bates and Goldfarb. In City
of Lafayette v. Louisiana Power &
Light Co., 435 U.S. 389, 410, 98 S.Ct.
1123, 1135, 55 L.Ed.2d 364 (1978), and
in California Liquor Dealers v. Midcal
Aluminum, 445 U.S. 97, 105, 100 S.Ct.
937, 943, 63 L.Ed.2d 233 (1980), the

Court held that for the state-action exemption to apply, "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy;' [and] the policy must be 'actively supervised' by the state itself." The failure to meet either requirement precludes application of the antitrust immunity. Midcal, 445 U.S. at 105, 100 S.Ct. at 943.

In the instant case, the Arizona Supreme Court had delegated to the Bar the duty of examining attorney applicants to determine whether they "have the necessary qualification." Ariz.Sup.Ct.R. 28(a). At all times relevant to this action, however, the Rules contained no provision regarding

how the Bar should grade exams.^{1/}

According to Ronwin, the Bar's method of grading the exams was not designed to fulfill the purpose established by the Arizona Supreme Court.

Viewing the present case in light of Midcal's state-action requirements, we conclude that the challenged grading procedure fails to qualify for antitrust immunity. The alleged restraint was not "clearly articulated and affirmatively expressed as state policy," Midcal's first requirement. 445 U.S. at 105, 100 S.Ct. at 943.

^{1/}Effective March 17, 1980, the Arizona Supreme Court amended Rule 28(c), at VII, to include a requirement that the Bar "file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination." Our analysis of the present issue might be different had this provision been in effect at the time Ronwin took the exam.

Like the defendant bar associations in Goldfarb, the Arizona Bar has no statute or Supreme Court Rule to point to as requiring their challenged grading procedure. See 421 U.S. at 790-91, 95 S.Ct. at 2014-15.

The fact that the Arizona Supreme Court has delegated to the Bar the general authority to examine applicants and routinely accepts the Bar's recommendations regarding admission does not alone clothe the Bar's private grading policies with blanket immunity from the antitrust laws. "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private [restraint]." Midcal, 445 U.S. at 106, 100 S.Ct. at 944. As the Court emphasized in Goldfarb, "[i]t is

not enough that, as the...Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U.S. at 791, 95 S.Ct. at 2015.

Bates would be on all fours with the instant case if Bates had involved a general supreme court rule requiring lawyers to act in a professional manner, and that rule had been interpreted by the Bar as requiring an absolute ban on lawyer's advertising. however, the rule prohibiting advertising had been explicitly adopted by the state supreme court. Alternatively, if the state supreme court had, in the instant case, stated explicitly that only a certain number of attorneys would be admitted to the

Bar each year there might be immunity for the Bar's carrying out this directive under Bates. Consequently, even if it were established that the Bar was actively supervised by the state supreme court, that factor alone would be insufficient to justify applying state-action immunity. Midcal, 445 U.S. at 105, 100 S.Ct. at 943.

We do not agree with our dissenting colleague's contention that our resolution of the state-action issue is inconsistent with this court's prior decision. Hackin v. Lockwood, 361 F.2d 499 (9th Cir. 1966); Chaney v. State Bar of California, 386 F.2d 962 (9th Cir. 1977); and Brown v. Board of Bar Examiners, 623 F.2d 605 (9th Cir. 1980) do not support the dissent's contention that bar grading

procedures inherently involve state action, that such procedures may be challenged only on constitutional grounds, and that the Arizona Supreme Court was the proper defendant in this case. These cases did not involve antitrust challenges to bar grading procedures. The plaintiffs in all three cases based their claims on alleged violations of their individual constitutional rights under 28 U.S.C. § 1343 or 42 U.S.C. § 1983.^{1/}

^{1/}In Hackin and Brown, the plaintiffs sued under 28 U.S.C. § 1343 which authorizes actions "[t]o redress the deprivation [of an individual's fourteenth amendment rights] under color of any State law...." Similarly, the plaintiff in Chaney sued under 42 U.S.C. § 1983, claiming that his civil rights had been violated by the bar's refusal to certify him for admission. (Continued on next page)*

* Continuation instructions added for convenience of the Court.

The national policy in favor of competition, Midcal, 445 U.S. at 106, 100 S.Ct. at 944, should not be

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The dissent imparts great significance to the statement in Brown that "the only constraints on the states' exclusive jurisdiction [over bar admission matters] are constitutional in nature...." 623 F.2d at 609. This statement, however, is only true in terms of § 1343 actions like the one at issue in Brown because, as the court notes in the very next sentence: "federal courts are granted jurisdiction under 28 U.S.C. § 1343 to vindicate [only] constitutional rights." This jurisdictional limitation stems from the express language of § 1343, not from the fact that the plaintiff was challenging a bar admission policy. One need go no farther than Goldfarb, where the Court held that the minimum-fee schedule enforced by the state bar violated § 1 of the Sherman Act, to see that Ronwin's complaint established subject-matter jurisdiction under federal antitrust laws.

Similarly, a careful reading of the three decisions reveals that they do not hold that a state supreme court is the only proper defendant in challenges to bar grading procedures. (Continued on next page)

thwarted absent a clear articulation
by the Arizona Supreme Court that it

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As the court explained in Brown, the
state supreme court is the proper
party when it has promulgated the
specific challenged rule. 623 F.2d at
608 n.6.

In Hackin, as the Brown court noted,
the court held that the "State Bar of
Arizona is not an appropriate party to
the suit because it cannot promulgate
or change the rules governing
admission to practice in Arizona."
361 F.2d at 500. The court emphasized
that the admission rule at issue,
barring graduates of unaccredited law
schools from taking the bar exam, was
directly promulgated and enforced by
the state supreme court. Id. at
500-01. In Chaney, the court's
discussion clearly concerns finality
and the nature of the plaintiff's
claim, and has no relevance to the
issues of state action or proper
parties. See 386 F.2d at 966-67. It
also should be noted that the Chaney
court discusses the plaintiff's
restraint of trade contention (similar
to Ronwin's claim) at length, and
rejects it on factual rather than
jurisdictional grounds. Id. at 965.
Thus, these decisions offer no support
for the contention that there is a
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had adopted a policy of limiting the number of attorneys admitted to the Arizona bar each year. Absent such a declaration, Ronwin must be given an opportunity to prove that the Bar's policy was designed to limit the number of attorneys, as opposed to being designed to ensure that attorneys have the necessary qualifications. Thus, Ronwin's action should not have been dismissed on the ground that the Bar enjoys absolute immunity under the antitrust laws.

B. SUBJECT MATTER JURISDICTION

The requirement of interstate commerce established by the Sherman Act, 15 U.S.C. § 1, is

(Continued from previous page)
blanket rule making state supreme courts the only proper defendants in all bar admission cases.

jurisdictional. See Western Waste Service Systems v. Universal Waste Control, 616 F.2d 1094, 1097 (9th Cir.), cert. denied, 449 U.S. 869, 101 S.Ct. 205, 66 L.Ed.2d 88 (1980); see generally McLain v. Real Estate Board, Inc., 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980). Judge Real evidently found that the Bar's alleged activity did not affect interstate commerce so as to invoke jurisdiction under the Sherman Act, 15 U.S.C. § 1. The Bar contends that denying Ronwin admission to the Arizona bar is a purely local matter, and thus, the jurisdictional requirement of the Sherman Act was not satisfied by Ronwin's complaint. Ronwin responds that the services of Arizona lawyers are required by people living outside Arizona. By artificially restricting

the number of lawyers admitted to practice in Arizona, the price paid by out-of-state clients for legal services performed by Arizona lawyers is higher than it would be if the number of lawyers was not restricted.

In order to establish jurisdiction under the antitrust laws, a plaintiff must establish that the defendant's activity either (1) is itself in commerce or (2) "has an effect on some other appreciable activity demonstrably in interstate commerce" McLain, 444 U.S. at 242, 100 S.Ct. at 509 (emphasis added). Because of the confusion surrounding both of these tests, we will consider Ronwin's allegation of interstate commerce under both the "in commerce" and the "effect on commerce" tests. See Bain

v. Henderson, 621 F.2d 959, 960 n.1
(9th Cir. 1980).

(1) The "in commerce" test

The leading Supreme Court decision applying the "in commerce" test is Goldfarb v. Virginia State Bar, 421 U.S. at 783-86, 95 S.Ct. at 2011-13. In Goldfarb, plaintiffs alleged that the Virginia State Bar was fixing the prices charged by lawyers handling real estate transactions. In upholding jurisdiction, the Court noted that the real estate transactions which require legal services are frequently interstate transactions. 421 U.S. at 783-84, 95 S.Ct. at 2011-12. Thus, the Court reasoned that any restraint on those services has a substantial effect on interstate commerce. Id. at 785, 95

S.Ct. at 2012.^{1/}

In the instant case, Ronwin has not specifically stated which interstate transactions require legal services. See Bain, 621 F.2d at 961. Nor has he indicated how substantial an effect on interstate commerce results from restricting the number of lawyers practicing in Arizona. Ronwin does have the burden of establishing

^{1/}The lawyer was required to examine the title to the property which was being purchased before financing could be obtained. Financing was available through out-of-state agencies. The court concluded:

Given the substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected [footnote omitted].

421 U.S. at 785, 95 S.Ct. at 2012.

jurisdiction. McLain, 444 U.S. at 242, 100 S.Ct. at 509. However, it is not inconceivable that he could establish that legal services constitute an indispensable and inseparable component of certain interstate transactions. Therefore, we remand for further findings on the jurisdictional question. See McLain, 444 U.S. at 246, 100 S.Ct. at 511, ("a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'" (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957))). Cf. Bain, 621 F.2d at 960-61 (because the court found that under no conceivable set of facts could the plaintiff meet the Goldfarb

test, it affirmed the district court's dismissal).

(2) The "effect on commerce" test

In McLain, plaintiffs charged that various New Orleans-based real estate brokers were engaged in a price-fixing conspiracy. The Court held that plaintiffs had shown that defendants' conduct affected interstate commerce.^{1/} McLain, 444 U.S. at 245, 100 S.Ct. at 510-11.

Specifically, the Court noted indications in the record: (1) that "an appreciable amount of commerce [was] involved in the financing of

^{1/}The Court specifically stated that a party need only show that a defendant's general business, as opposed to the alleged illegal conduct, affected interstate commerce in order to meet the jurisdictional requirement. McLain, 444 U.S. at 242, 100 S.Ct. at 509.

residential property in the Greater New Orleans area" and that the commerce involved various interstate corporations, id. at 245, 100 S.Ct. at 510-11; and (2) that the activities of the real estate brokers, by affecting the terms and frequency of local real estate transactions, could have a "not insubstantial effect on interstate commerce." Id. at 246, 100 S.Ct. at 511.

Ronwin has not alleged either that there are an appreciable number of interstate transactions taking place in Arizona or that limiting the number of lawyers has a not insubstantial effect on the number or size of these transactions. However, as is true under the "in commerce" test, it is not inconceivable that Ronwin will be able to establish jurisdiction under the "effect on commerce" test. See,

e.g., McLain, 444 U.S. at 245-47, 100 S.Ct. at 510-11; Western Waste Service, 616 F.2d at 1097-99.

Therefore, on remand the district court should initially give Ronwin the opportunity to prove that his complaint meets the jurisdictional requirements under either of the tests discussed above.

C. STANDING

In order to have standing to maintain a private antitrust action, a party must allege injury to the party's business or property occurring by reason of the antitrust violation, 15 U.S.C. § 15; Solinger v. A. & M. Records, Inc., 586 F.2d 1304, 1309 (9th Cir. 1978), cert. denied sub nom. Motown Record Corp. v. Solinger, 441 U.S. 908, 99 S.Ct. 1999, 60 L.Ed.2d 377 (1979). The Bar contends that even if it committed an antitrust

violation, the violation did not cause Ronwin's injury. The Bar relies on the fact that Ronwin was found mentally unfit to engage in the practice of law. Thus, according to the Bar, even if Ronwin had passed the Bar exam, he would not have been admitted to practice in Arizona.

Ronwin was not found mentally unfit to practice law until July of 1974, three months after the exam results were released. If Ronwin had passed the exam in April, he arguably would have been able to practice law for the three months until he was found to be mentally unfit.^{2/} Because the Bar's

^{2/}The Bar does not argue that Ronwin would have been denied admission in April because of his alleged mental handicap had he passed the exam at that time, nor would it be appropriate for this court to speculate that Ronwin would have been denied admission to the Bar as early as April on these grounds.

alleged illegal action caused Ronwin to be denied admission to the Bar, even if for only three months, Ronwin has sufficiently alleged that he was injured by reason of an unlawful practice. See Kapp v. National Football League, 586 F.2d 644, 648 (9th Cir. 1978), cert. denied, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). Cf. Solinger, 586 F.2d at 1311 (prospective purchaser of company has standing to sue companies that foreclosed his ability to enter market).

In order to recover damages, Ronwin will have to prove that the Bar's actions caused him actual damages. However, an allegation of even minimal actual damages suffices to confer standing under the antitrust laws. See First Beverages, Inc. v.

Royal Crown Cola Co., 612 F.2d 1164, 1175 (9th Cir.), cert. denied, 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 1980). An antitrust plaintiff is held to a higher standard in proving the fact of damage, which is essentially an element of causation, than in proving the measure of damages. Knutson v. Daily Review, Inc., 548 F.2d 795, 811 (9th Cir. 1976), cert. denied, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977). If the 1974 bar exam may still be impartially regraded to ascertain whether Ronwin would have received a passing grade, but for the alleged improper method of restricting bar admission, the court may so order and supervise such a procedure. If the court decides that such a remedy is no longer feasible, under the peculiar circumstances of this case, whereby

Ronwin will not be entitled to practice law in Arizona, the court would be justified in presuming that he would have passed for the purpose of ascertaining damages, if any. The amount of damages would be limited to Ronwin's loss of earnings, between April, when he would have been admitted to the Bar, and July, when the Bar found him unfit to practice law.^{10/} See Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981)(special solicitude for proof of damages when defendant's conduct has

^{10/}Although the Bar has not raised it, there may be an eleventh amendment issue in this case. The Bar is a state agency which is funded primarily from the dues collected from its members. Ariz.Sup.Ct.R. 27. However, it is unclear whether the Bar receives any monies from the state treasury, and if it does, whether this
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been a factor in speculative nature of damages).

III

THE RECUSAL QUESTION

Ronwin appeals Judge Real's denial of his motion for recusal. At the

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would necessarily immunize the Bar from suit, brought in federal court seeking monetary relief. The Bar has been established as an organization that can sue or be sued, Ariz.Sup.Ct.R. 27, but the above Supreme Court Rule would not constitute a waiver for eleventh amendment purposes.

Since the Bar has not raised the argument, it may be fair to assume that the Bar receives no money from the State treasury. However, if the Bar receives any money from the State treasury, the district court, absent a waiver, may lack jurisdiction. See State of New Mexico v. American Petrofina, Inc., 501 F.2d 363, 366-67 & n.6. (9th Cir. 1974)(stating in dicta that the eleventh amendment would create serious difficulties in a suit for damages against the state).

proceeding below, Ronwin set forth, in various affidavits and motions, facts which he contends indicate that Judge Real was biased and prejudiced against him. Therefore, he contends that Judge Real was required to recuse himself pursuant to 28 U.S.C. §§ 144 and 455.^{11/}

^{11/}28 U.S.C. § 144 provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before
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The test for disqualification is the same under both sections 144 and 455.

United States v. Sibla, 624 F.2d 864,

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the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Under this section the district judge must accept the truth of the factual assertions in the affidavit and determine only whether the affidavit is legally sufficient. See United States v. Azhocar, 581 F.2d 735, 739 (9th Cir. 1978), cert. denied, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979).

28 U.S.C. § 455 provides in part:

- (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
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867 (9th Cir. 1980); United States v. Olander, 584 F.2d 876, 882 (9th Cir. 1978), vacated on other grounds sub nom. Harrington v. United States, 443 U.S. 914, 99 S.Ct. 3104, 61 L.Ed.2d 878 (1979). That test is whether "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States v. Winston, 613 F.2d 221, 222 (9th Cir. 1980). However, in evaluating a judge's impartiality where bias or prejudice is alleged, the bias or

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(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, ...

prejudice "must stem from an extra-judicial source." United States v. Azhocar, 581 F.2d 735, 739 (9th Cir. 1978), cert. denied, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979).

Most of Ronwin's specific allegations of bias or prejudice involve judicial acts which Judge Real either performed^{11/} or failed to

^{11/}Ronwin contends that Judge Real constantly interrupted him in his presentation of his case in another proceeding. Although the record in the other proceedings has not been filed, and thus it cannot be definitely determined whether the interruptions were justified, a judge is granted great deference in controlling the courtroom and the number of interruptions does not per se indicate extra-judicial prejudice. See United States v. IBM, 475 F.Supp. 1372 (S.D.N.Y. 1979), aff'd., 618 F.2d 923 (2nd Cir. 1980). Cf. Sibla, 624 F.2d at 869 (district court's characterization of defense theory as legally frivolous not indicative of prejudice).

perform.^{11/}

Ronwin also contends that Judge Real is prejudiced against him because

^{11/}Ronwin contends that Judge Real failed to act in the following situations:

- (1) When he tolerated deceit committed by a defendant in another action involving Ronwin;
 - (2) When he did not condemn defense counsel for slandering Ronwin and failed to order the record expunged;
 - (3) When he did not take action to discourage abuse directed at Ronwin by the district court clerk;
 - (4) When he showed a deference to anti-semitism by failing to condone Ronwin's actions against anti-semitism and in implying that only Jews can protest against anti-semitism;
 - (5) When he failed to rule immediately on Ronwin's affidavit of bias and
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Judge Real is a defendant in another action brought by Ronwin. However, [a] judge is not disqualified merely because a litigant sues or threatens to sue him."¹⁴ United States v.

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 prejudice; thus preventing Ronwin from pursuing discovery against defendants who were hindering discovery attempts; and

(6) When he refused to postpone the hearing date so as to allow Ronwin an opportunity to conduct discovery and to respond to the Bar's motion to dismiss.

None of these non-actions by Judge Real involves extra-judicial acts which would indicate, on their face, prejudice or bias. Moreover, adverse rulings by themselves do not constitute the requisite bias or prejudice. Azhocar, 581 F.2d at 738.

¹⁴ Judge Real apparently became a defendant in an action brought by Ronwin after the instant action was assigned to Judge Real.

Grismore, 564 F.2d 929, 933 (10th Cir. 1977), cert. denied, 435 U.S. 954, 98 S.Ct. 1586, 55 L.Ed.2d 806 (1978).

Such an easy method for obtaining disqualification should not be encouraged or allowed.

Finally, Ronwin contends that Judge Real's participation in ex parte communications with the Bar's counsel indicates the judge's prejudice against Ronwin. A judge is generally required to accept the truth of the factual assertions in an Affidavit of Bias filed pursuant to 28 U.S.C. § 144. Azhocar, 581 F.2d at 739. However, Ronwin's allegation of ex parte communication relates to facts that are peculiarly within the judge's

knowledge.^{15/} Given Judge Real's emphatic denial of Ronwin's allegations, and Ronwin's failure to show how such communications indicated the judge's prejudice except in the most general manner, Judge Real did not abuse his discretion by denying Ronwin's motion on this ground.

^{15/}Ronwin's allegation of ex parte communication between Judge Real and the Bar's counsel is based on the fact that the Bar's counsel in setting a hearing date on the Bar's motion to dismiss knew when Judge Real would be in Phoenix. According to Ronwin, counsel could only have obtained that knowledge through ex parte communications with the Judge. The Bar's counsel explained, however, that he knew Judge Real would be in Phoenix on the day he suggested for a hearing in the instant case, because he had received an order from the court in another case assigned to Judge Real in which he was defense counsel (and Ronwin was plaintiff) setting the date suggested as the hearing date in that other case.

Sibla, 624 F.2d at 869 (applying abuse of discretion standard).

IV

CONCLUSION

We conclude that the district court erred in dismissing Ronwin's complaint pursuant to a Rule 12(b)(6) motion. We also conclude that the district judge did not abuse his discretion in refusing to recuse himself. AFFIRMED.

FERGUSON, Circuit Judge, dissenting:

It is hard to believe what the majority of the judges in this case have done.

It is now the law in this circuit that a person who has been found by the Supreme Court of the State of Arizona to be mentally unable to engage in the practice of law in the State of Arizona may still maintain a \$1,200,000 damage action under the

federal antitrust laws against the State Bar of Arizona, the members of the Committee on Examinations and Admission of the Supreme Court of Arizona and their spouses, for refusing to permit him to compete as an attorney in the State of Arizona!

Precedents in this circuit and the Supreme Court mandate that when the board of bar examiners' grading procedures are challenged, such a challenge must be brought against the state supreme court as defendant. Moreover, because the action of the state supreme court is state action with the Parker exception, that action is immune to an antitrust attack. Further, the impact of the actions alleged by Ronwin are insubstantial and thus outside the antitrust laws. Consequently, I dissent from the

majority's conclusion that the antitrust laws apply to this bar examination matter.

I. CHALLENGE TO DENIAL OF BAR ADMISSION

A. Proper Defendant

A state's discretion over rules for admission to legal practice is vested in the judiciary, or the legislature. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). In Hackin v. Lockwood, 361 F.2d 499 (9th Cir.), cert. denied, 385 U.S. 960, 87 S.Ct. 396, 17 L.Ed.2d 305 (1966), we held that the power to grant or deny admission to the bar is vested in the Arizona Supreme Court. Hence, the State Committee on Examinations and Admission was not a proper defendant because it was merely

a committee of the Arizona Supreme Court with powers delegated by the court. Id. at 500.

In Hackin, plaintiff, the graduate of an unaccredited law school, could not take the bar because a state bar rule allowed only graduates of accredited law schools to take the bar. Plaintiff sued the justices of the Arizona Supreme Court, the State Bar of Arizona, and the Committee on Examinations and Admissions. In holding that the state bar and the Committee on Examinations and Admissions were improper defendants, the court explained:

The State Bar of Arizona is not an appropriate party to the suit because it cannot promulgate or change the rules governing admission to practice in Arizona. Its Board of Governors can suggest rules to the Arizona

Supreme Court, and can enforce them, but only with the approval of the Arizona Supreme Court....

In the original complaint, but not in the amended complaint, appellant named as a defendant the "Committee on Examinations and Admissions," presumably of the State Bar. This is not a committee of the State Bar, but a committee named by the Supreme Court of Arizona, made up of members of the Arizona State Bar, Rule 28(a). Thus we find the power to grant or deny admission is vested solely in the Arizona Supreme Court....

361 F.2d at 499 (9th Cir. 1966).

Considering a similar admissions procedure, the court reiterated this conclusion in Chaney v. State Bar of California, 386 F.2d 962 (9th Cir. 1977), cert. denied, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968). In that case, we held that the refusal of the State Bar Committee to certify an applicant was not a terminative step

in the admissions process. Because final decision is vested in the state supreme court, the committee's decision not to admit had no "fixative" status until the court approved or rejected the committee's recommendation. Id. at 966. Once a decision is final, the supreme court is the proper defendant when a party complains about examination procedures. The Committee of Bar Examiners cannot be a party because it is merely an arm of the state supreme court "for the purposes of assisting in matters of admission . . .," which matters remain ultimately in the court. Id. If the plaintiff is deprived of a right, it is the state supreme court, not the Committee on Examinations and Admissions, that is the source of the deprivation.

These decisions were reaffirmed in Brown v. Board of Bar Examiners, 623 F.2d 605 (9th Cir. 1980). The Bar Examiners of Nevada were found to be an improper party for the reason articulated in Hackin and reemphasized in Chaney.^{1/} Id. at 608. See also

^{1/}In Brown, a graduate of an unaccredited law school sued the Nevada Supreme Court, State Bar, and Board of Bar Examiners to allow her to sit for the bar. The district court dismissed the State Bar and the Board of Bar Examiners as improper parties under Hackin, yet issued an injunction against them. 623 F.2d at 608. In allowing the bar and the board to appeal, the court of appeals explained:

We see no logic in the district court's novel rulings which currently dismissed appellants and yet granted specific relief against them. Whatever the rationale, however, appellants should not be denied appellate review of orders by which they are aggrieved.

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Whitfield v. Illinois Board of Law
Examiners, 504 F.2d 474 (7th Cir.
1974)(reaching similar conclusion).
Accordingly, Ronwin cannot sue the
Arizona State Bar Examiners.

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Id. Clearly, the court allowed the
two parties to appeal because they
were aggrieved. In dictum, the court
said that Hackin, involving a
challenge to the validity of a state
supreme court rule governing admission
to the bar, did not apply to make the
state bar and the board improper
defendants, since these were the only
parties who could "physically comply"
with an injunction requiring the
defendants to let the plaintiff sit
for the bar. Id. at 608 & 608 n.6.
Even assuming the correctness of that
dictum, it has no application to this
case. Ronwin complains not of the
failure of the state bar to seat him
for the exam--he failed it--but of the
failure of the supreme court to admit
him. Admission to the bar is within
the province of the supreme court, not
the state bar, nor the committee.

B. Limitations on Challenges

Court review of state procedures for admission and testing is guided by the rational basis standard. Chaney v. State Bar, supra, at 964; Tyler v. Vickery, 517 F.2d 1089, 1099 (5th Cir. 1975), cert. denied, 426 U.S. 940, 96 S.Ct. 2660, 49 L.Ed.2d 393 (1976).^{1/}

^{1/}A variety of discretionary practices have been sanctioned by the courts. Statutes permitting admission without examination are valid. Shenfield v. Prather, 387 F.Supp. 676 (N.D.Miss. 1974). A state may validly require an applicant to pass an examination in essay form. Chaney v. State Bar, supra. A state may allow state graduates to waive examination without denying equal protection to other applicants. Huffman v. Montana Supreme Court, 372 F.Supp. 1175 (D.C.Mont.), aff'd, 419 U.S. 955, 95 S.Ct. 216, 42 L.Ed.2d 172 (1974). A board of bar examiners may validly meet to review borderline failure after all scores are tabulated. Hooban v. Board of Governors of Washington State Bar Ass'n, 85 Wash.2d 774, 539 P.2d 686, app. dismiss'd, 424 U.S. 902, 96 S.Ct. 1092, 47 L.Ed.2d 306 (1976). Subjective grading by examiner is allowed. Tyler v. Vickery, supra.

While the discretion granted to states and bar examiners is broad, the opportunity to practice law is protected by the due process and equal protection clauses of the fourteenth amendment. Willner v. Committee on Character & Fitness, 373 U.S. 96, 102, 83 S.Ct. 1175, 1179, 10 L.Ed.2d 224 (1963). Brown v. Board of Bar Examiners, supra, established a definite procedure for challenging admission practices. Noting that admission procedures are purely a matter of local concern, Brown stated, "The only constraints on the states' exclusive jurisdiction are constitutional in nature...." 623 F.2d at 609.

Brown outlined the alternatives available to an unsuccessful applicant:

Since federal courts are granted jurisdiction under 28 U.S.C. § 1343 to vindicate constitutional rights, an issue arises as to the extent of a federal court's authority to participate in what is primarily a state concern. A dichotomy has developed between two kinds of constitutional attack which might be pursued by an unsuccessful bar applicant: "The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission." Doe v. Pringle, 550 F.2d 596, 597 (10th Cir. 1976), cert. denied, 431 U.S. 916, 97 S.ct. 2197, 53 L.Ed.2d 227 (1977).

In the first type of attack, federal district courts may assert jurisdiction under § 1343 to ensure that generally applicable rules or procedures do not impinge on constitutionally protected rights. Federal courts have frequently entertained challenges to rules controlling admission to the

bar, and have almost without exception sustained the validity of such rules. [Citations omitted].

On the other hand, a state court's decision on an individual application may not be disturbed in an original suit in federal district court. "[O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court" Mackay v. Nesbet, 412 F.2d 846 (9th Cir.), cert. denied, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969). In exercising its judgment on an individual petition, a state supreme court performs a judicial act, In re Summers, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945), reviewable in the Supreme Court. See Schware v. Board of Bar Examiners, supra, 353 U.S. at 238, 77 S.Ct. at 755; Konigsberg v. State Bar of California, 353 U.S. 252, 258, 77 S.Ct. 722, 725, 1 L.Ed.2d 810 (1957). A federal district court, in contrast, does not sit as an appellate court and therefore lacks jurisdiction to review

state court actions denying admission to the bar, even though the denial allegedly involves deprivation of constitutional rights.

Brown, supra, at 609-10 (citations omitted). The plaintiff in Brown attempted the only viable challenge to state bar admission procedures--a constitutional challenge. Brown denied jurisdiction because the plaintiff presented a claim of individual constitutional deprivation and the prayer for relief sought individual redress including monetary damages. Hence, the court found that the claim was not cognizable in district court. Brown, supra, at 611.

C. The Majority Opinion

The opinion disregards the tradition of deference to state discretion in admission procedures. Because such deference has never existed toward the

state's ability to regulate fees, the majority's reliance on Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), is misplaced. Further, the opinion creates an antitrust cause of action where the only challenge that might be appropriate is a constitutional one. Brown, 623 F.2d at 609. Finally, Brown held that a federal district court does not have jurisdiction over a claim against bar examiners because the state court is the real party in interest in admissions cases. In addition, jurisdiction is allowed only where the suit alleges arbitrary and capricious procedures violative of due process. 623 F.2d at 610. However, the qualifications for admission in Arizona are "nearly identical" to

those unsuccessfully challenged in Brown. Id. at 610, n.9. Because Ronwin has sued the wrong defendant and because his suit raised no constitutional challenge to admission procedures, binding precedent requires that the district court's dismissal be affirmed.

II. THE ANTITRUST EXEMPTION

The Parker antitrust exemption is grounded on our federal system:

In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker v. Brown, 317 U.S. 341, 351, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943).

The unfortunate effect of the majority

opinion is to attribute to the Sherman Act a congressional intent to limit a state's control over bar admissions.

The proposition for which National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), stands, namely, that federal interference should not extend to essential state functions, should be applicable to both antitrust and commerce clause cases. See Lafayette v. Louisiana Power & Light Co., 434 U.S. 389, 423, 430, 98 S.Ct. 1123, 1142, 1145, 55 L.Ed.2d 364 (1977)(Burger, C. J., concurring in Part I of the Court's opinion and in the judgment; Stewart, J. dissenting). I would think that regulation of bar admissions is an "integral operation in the area of traditional government functions."

See id. at 424, 98 S.Ct. at 1142. For that very reason, the Arizona Supreme Court oversees bar admissions and delegates authority to its agent; the state must have regulatory authority to examine the fitness and competence of bar applicants. If the state's agents abuse their authority, the proper remedy is a constitutional attack, not an antitrust attack that will undermine the authority that states qua states have to regulate bar admissions.

The majority applies erroneous standards to determine whether an agency is exempt from antitrust laws. The opinion distinguishes Ronwin's complaint from that in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), with the conclusion that "here: (1) a state

agency, as opposed to the state policy maker, was committing the alleged anticompetitive act; and, more importantly, (2) the alleged anticompetitive act did not fulfill a clearly articulated state policy." Both of these conclusions are incorrect.

As to the first characterization, Hackin, Chaney, and Brown held that the grading of law boards by a board of bar examiners is within the powers delegated by the supreme court--the state policymaker. Hence, the Ninth Circuit thrice reiterated that the supreme court is the proper party when grading decisions are challenged. The majority opinion ignores that statement.

The second characterization is also unfounded. An articulated state

policy of grading examinations and admitting attorneys to the bar is achieved by the board's grading procedures. The directive of California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980), that the challenged restraint be clearly articulated and affirmatively expressed as state policy and supervised by the state is met in a two-fold fashion. First, the Arizona Supreme Court has authorized the Board of Bar Examiners to grade examinations for admission. Second, this circuit has defined such matters to be within the power and control of the Supreme Court of Arizona, the proper defendant in admissions cases.

While the Midcal tests apply to this case, the Midcal facts are easily

distinguishable. In Midcal, the California wine price maintenance scheme was not actively supervised by the state. The state simply authorized private producers or wholesalers to fix prices and then enforced the prices set by the private parties in the event of a violation. In Ronwin, however, the Arizona Supreme Court has delegated certain duties to the Committee on Bar Examinations, and, as in California, see Chaney, supra, the Arizona committee acts as a mere instrumentality of the supreme court. Moreover, recommendations of the committee to the supreme court are merely advisory. Exercising its independent judgment, the state supreme court itself accepts or denies each and every recommendation by the

committee. By passing on every bar application, the state supreme court ratifies and adopts the very system that it has authorized.

The majority's reliance on Goldfarb v. Virginia State Bar, supra, is inappropriate. In that case, the state supreme court had not only made no reference to fees but it had also warned against exclusive reliance on such fees in an ethical code. 421 U.S. at 789, 95 S.Ct. at 2014. The county bar was a voluntary association which promulgated the fee schedule as "private anticompetitive activity" independent of the contrary to the suggestion of the Virginia Supreme Court. Id. at 792, 95 S.Ct. at 2015-16. The Court states: The threshold inquiry in determining if an anticompetitive action is State action ... is whether the activity is

required by the state acting as sovereign. Parker v. Brown, 317 U.S. [341,] 350-352, 63 S.Ct. 307 [at 313-314], 87 L.Ed. 315 [1943]." 421 U.S. at 790. For an exemption to apply, "anticompetitive activities must be compelled by the direction of the State acting as sovereign." Id. at 791, 95 S.Ct. at 2015.

The majority relies on Goldfarb rather than Bates as analogous to the instant case. Though neither Goldfarb nor Bates is exact replica of the case at hand, Bates is more directly on point. Goldfarb would be analogous if, in the instant case, the Arizona Supreme Court had rejected the Board of Bar Examiners' procedures; the state supreme court in Goldfarb had warned the state bar against enforcing the challenged fee schedules. In

contrast, the Arizona Supreme Court approved the procedures challenged here by accepting recommendations for admission based on those procedures. This implied validation of the board's grading system renders Bates the more direct and proper analogy.

In Goldfarb, the alleged anticompetitive activity was the promulgation of a fee schedule by the state bar. The schedule was expressly disclaimed by the state supreme court. The anticompetitive illegal result was that it involved price-fixing. In Bates, the activity of the state bar was to enforce a prohibition against advertising. There, the state bar was immune because the supreme court had promulgated the rule. The alleged anticompetitive result was to

monopolize. In Ronwin, the challenged activity is the grading of examinations on a curve. The state supreme court has entrusted the grading of examinations to the state bar. The alleged anticompetitive result is artificially to limit the number of attorneys and thereby to monopolize. The opinion erroneously subjects the state bar to antitrust laws by focusing on the alleged result and ignoring the immunity issue decided in Bates.

III. ALLEGED IMPACT ON COMMERCE

In order to prevail in an antitrust suit, a party must demonstrate an effect on commerce which is "more than trivial" in the relevant market.

Gough v. Rossmoor Corp., 585 F.2d 381, 389 (9th Cir. 178), cert. denied, 440

U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979). Ronwin's complaint neither identifies a relevant market nor alleges a substantial impact on such a market. A court should give a party the opportunity to demonstrate the elements of his case if his claim presents the possibility that he may prove substantial impact. However, on the facts of this case, Ronwin could not demonstrate more than the trivial impact of a curved grading system. The ability of applicants to reapply permits them to remain within the potential commerce stream.

In addition, the opinion relies on McLain v. Real Estate Board, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980), for the proposition that Ronwin could "conceivably" demonstrate impact on the relevant market. The

relevant market in this case, however, while not defined before the district court, is a broad and diffuse market that is not analogous to the well-defined property market in New Orleans with a specific percentage of out-of-state contractors. Without more, the conclusion of a conceivable impact in Ronwin does not flow from the facts of McLain.

CONCLUSION

For the foregoing reasons, I dissent.

Edward RONWIN, Plaintiff-Appellant,

v.

STATE BAR OF ARIZONA,

Carlock, George Read and Wanda

Myers, Robert D. and Judith

Wolfinger, Harold J. and Jane Doe

Richmond, James L. and Jane Doe

Karman, Howard H. and Jane Doe

Hoover, Charles R. and Jane Doe,

Defendants-Appellees.^{2/}

^{2/} (Petitioners' footnote)

The caption reflects a clerical error by the Court of Appeals. In the District Court, Ronwin sued the State Bar of Arizona; George Read Carlock and Wanda Carlock, Husband and Wife; Robert D. Myers and Judith Myers, Husband and Wife; Harold J. Wolfinger and Jane Doe Wolfinger, Husband and Wife; James L. Richmond and Jane Doe Richmond, Husband and Wife; D. Thompson Slutes and Jane Doe Slutes, Husband and Wife; Howard H. Karman and Jane Doe Karman, Husband and Wife; and Charles R. Hoover and Jane Doe Hoover, Husband and Wife, all of whom were appellees in the Court of Appeals.

No. 80-5004.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 16, 1981.

Decided Dec. 14, 1981.

As Amended on Rehearing Sept. 8, 1982.

Rehearing and Rehearing En Banc

Denied Dec. 2, 1982

Appeal from the United States
District Court for the District of
Arizona.

Before FERGUSON and BOOCHEVER,
Circuit Judges, and HATTER,^{**}/

HATTER, District Judge:

Ronwin sued the Arizona State Bar
("Bar") and the individual members
(and their spouses) of the Committee

^{**}/ The Honorable Terry J. Hatter,
Jr., United States District Judge for the
Central District of California, sitting
by designation.

on Examinations and Admissions of the Arizona Supreme Court ("Committee"), alleging that they had violated federal antitrust laws in grading the 1974 Arizona bar examination that Ronwin failed. The district court denied Ronwin's motion for recusal and dismissed the action for failure to state a claim, lack of jurisdiction, and lack of standing. We affirm the denial of the recusal motion, but reverse the dismissal decision as to the individual committee members^{1/} and remand for further proceedings.

^{1/} Although the Committee is appointed by the Arizona Supreme Court from a list of nominees chosen by the Bar's Board of Governors, it is not, as such, a committee of the State Bar. Because no specific allegations of wrongdoing have been made against the Bar, the dismissal for failure to state a claim was proper as to the Bar. For the same reason, we affirm the dismissal as to the spouses of the individual committee members.

I

FACTS

Ronwin took the Arizona bar examination in February, 1974. He was notified two months later that he had failed the examination. The Arizona Supreme Court refused to review his exam, and the United States Supreme Court denied certiorari. See Ronwin v. Committee on Examination and Admissions, 419 U.S. 967, 95 S.Ct. 231, 42 L.Ed.2d 183 (1974).^{1/}

^{1/} Ronwin applied to retake the bar examination in July, 1974, but was denied permission because the Committee declined to certify that he was "mentally and physically able to engage in active and continuous practice of law." See Ariz.Sup.Ct.R. 28(c)(IV)(5). A special committee conducted a formal hearing regarding the allegations of mental unfitness under Ariz.Sup.Ct.R. 28(c)(XII)(D). After holding a hearing, this special committee declined to find Ronwin
(Continued on next page)

Ronwin filed this antitrust action in March, 1978, alleging that defendants violated section 1 of the Sherman Act, 15 U.S.C. § 1, by illegally restricting competition among attorneys practicing in Arizona. The essence of Ronwin's complaint is that the Committee graded the exam to admit a predetermined number of persons, without reference to "achievement by each bar applicant of a pre-set standard [of competence]." For purposes of their motion to dismiss, defendants did not

(Continued from previous page)
mentally fit to practice law. The finding of unfitness was affirmed by the Arizona Supreme Court. Application of Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976), cert. denied, 430 U.S. 907, 97 S.Ct. 1178, 51 L.Ed.2d 583 (1977).

challenge the accuracy of Ronwin's allegations.^{1/}

At the time Ronwin took the bar exam, the Committee was authorized to determine whether bar applicants possessed the "necessary qualifications and . . . fulfill[ed] the requirements prescribed by the [Bar] board of governors as approved by [the Arizona Supreme Court]" Ariz.Sup.Ct. Rule 28(a)(1973) (amended in 1975 to create two separate committees). The Committee consists

^{1/} On remand, however, it may be necessary to determine the manner in which the 1974 examination was graded. Specifically, the court should determine whether the examination was graded as Ronwin alleges, or was graded on a different basis, such as a "scaled" formula, designed to equalize the difficulty of the exam over various years with the pass-fail determination being based on individual merit rather than numerical quota.

of seven active members of the State Bar who, upon the recommendation of the Bar's Board of Governors, are appointed by the Arizona Supreme Court. Id. As Ronwin noted in paragraph II of his complaint, the State Bar is a private entity to which all Arizona lawyers belong, and the individual defendants were members of "the Committee . . . and, as such, presided over and conducted the process by which applicants for membership in [the] Bar were examined. . . ."

II

DISMISSAL OF RONWIN'S ACTION

The district court gave three reasons for dismissing the action: (1) the complaint failed to state a claim upon which relief could be granted;

(2) the court lacked jurisdiction over the subject matter; and (3) Ronwin lacked standing to seek the relief requested. These reasons will be discussed seriatim.

A. Failure to State a Claim--
State-Action Immunity

The district court's ruling that Ronwin had failed to state a claim was apparently based on its acceptance of defendants' argument that bar grading procedures are immune from federal antitrust laws. Relying primarily on Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the defendants argue that, even assuming, arguendo, the grading formula was anticompetitive, the Committee's status as a state agent renders its actions absolutely immune from antitrust liability. We disagree.

In Bates, the Supreme Court held that a disciplinary rule adopted by the Arizona Supreme Court and enforced by the Arizona state bar, which prohibited lawyers from advertising, did not violate the federal antitrust laws under the state-action exemption first announced in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). 433 U.S. at 359-61, 97 S.Ct. at 2696-97. The Court stressed that the real party in interest was the Arizona Supreme Court because it had adopted the challenged restraint. Because the challenged restraint had been specifically adopted by the state acting, through the State Supreme Court, as sovereign, it therefore reflected a clear and affirmative articulation of state policy. Id. at 361-62, 97 S.Ct. at 2697-98. In the

present case, by contrast, the challenged restraint was not adopted or directly authorized by the Arizona Supreme Court.

In a more analogous case, the Supreme Court held that the activities of a county and a state bar association in publishing and enforcing a minimum-fee schedule were not shielded by the state-action exemption. Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-92, 95 S.Ct. 2044, 2013-15, 44 L.Ed.2d 572 (1975). The Court stated:

The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman act was not meant to proscribe is whether the activity is required by the State acting as sovereign. Parker v. Brown, 317 U.S. at 350-352 [63 S.Ct. at 313-14]; Continental Co. v. Union Carbide, 370 U.S. 690, 706-07 [82 S.Ct. 1404, 1414-15, 8

L.Ed.2d 777] (1962). Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent.

Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities. . . . It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

Id. at 790-91, 95 S.Ct. at 2014-15.

Subsequent Supreme Court decisions underscore the distinction between Bates and Goldfarb. The Court has repeatedly emphasized in these more

recent decisions that for the state-action exemption to apply the challenged restraint must be clearly articulated and affirmatively expressed as state policy and be actively supervised by the state itself. See, e.g., City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410-13, 98 S.Ct. 1123, 1135-36, 55 L.Ed.2d 364 (1978); New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 109, 99 S.Ct. 403, 411, 58 L.Ed.2d 361 (1978); California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980); Community Communications Co. v. City of Boulder, 455 U.S. 40, 48-51, 102 S.Ct. 835, 839-41, 70 L.Ed.2d 810 (1982). The failure to meet either requirement precludes application of the antitrust

immunity. Midcal, 445 U.S. at 105, 100 S.Ct. at 943.

Viewing the present case at this stage of the proceedings in light of the Court's state-action requirements, we conclude that the challenged grading procedure fails to qualify for antitrust immunity. It has not been established that the alleged restraint was "clearly articulated and affirmatively expressed as state policy." Midcal's first requirement. Id. Like the defendants in Goldfarb, the defendants here have no statute or Supreme Court Rule to point to as directly requiring the challenged grading procedure.^{1/} See 421 U.S. at 790-91, 95 S.Ct. at 2014-15.

^{1/} The challenged policies in Benson v. Arizona State Board of Dental Examiners, 673 F.2d 272, 275-76 (9th Cir. 1982) (as amended), in contrast to this case, were explicitly mandated by statute.

The fact that the Arizona Supreme Court has delegated to the Committee the general authority to examine applicants to determine if they are qualified to practice law and reviews the Committee's recommendations regarding admission does not alone clothe the Committee's unilateral grading policies with blanket immunity from the antitrust laws. "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement" over actions of the Committee that were not affirmatively expressed as state policy by the Arizona court. Midcal, 445 U.S. at 106, 100 S.Ct. at 943. As the Court emphasized in Goldfarb, "[i]t is not enough that, as the . . . Bar puts it, anticompetitive conduct is 'prompted'

by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U.S. at 791, 95 S.Ct. at 2015. Accord, Phonetele, Inc. v. American Telephone and Telegraph Co., 664 F.2d 716, 736 (9th Cir. 1981).

The fact that the Committee was established by Supreme Court Rule and composed of members selected from the Bar by the Arizona Supreme Court is not, as defendants assert, dispositive in itself of the state-action question.^{1/} Although the defendants

^{1/} As in City of Boulder and City of Lafayette, "[t]his case's preliminary posture makes it unnecessary for us to consider other issues regarding the applicability of the antitrust laws in the context of suits by private litigants against government defendants . . . [or to] (Continued on next page)

in the United States Supreme Court's state-action decisions were public bodies, or subdivisions of the state, that did not end the Court's analysis. The Court still looked to see whether the challenged restraints were clearly articulated and affirmatively expressed as state policy and were actively supervised by the state acting as sovereign. Thus, for instance, it was not dispositive that the restraints challenged in Parker, Orrin W. Fox, and Midcal were enforced, respectively, by a state commission, a state board, and a state department. 317 U.S. at 344, 63 S.Ct.

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confront the issue of remedies appropriate against [public] officials." City of Boulder, 455 U.S. at 56 n.20, 102 S.Ct. at 843 n.20. Accord, City of Lafayette, 435 U.S. at 401-02, 98 S.Ct. at 1130-31.

at 310; 439 U.S. at 103, 99 S.Ct. at 408; 445 U.S. at 100, 100 S.Ct. at 940. In City of Lafayette, 435 U.S. at 408, 98 S.Ct. at 1134, a plurality of the Court expressly rejected the argument that the state-action exemption extends to "all governmental entities, whether state agencies or subdivisions of a State . . . simply by reason of their status as such." This position has since been adopted by a majority of the Court. See City of Boulder, ____ U.S. at ____, 102 S.Ct. at 842.

The question remains whether the challenged restraint allegedly fashioned by the Committee was sufficiently "articulated" and "supervised" by the Arizona Supreme Court. Standing alone, the fact that the court established the Committee

and selected its members does not affect the reasoning underlying our conclusion that the challenged grading procedure was not clearly articulated and affirmatively expressed as state policy, Midcal's first requirement.

Effective January 15, 1974, 45 days before the examination Ronwin failed, the Arizona Supreme Court adopted Rule 28(c)(VII) (B) which requires the Committee to file its proposed grading formula with the Supreme Court at least 30 days before each examination. This review procedure was not brought to the attention of the district court either in the pleadings or in the papers pertaining to the motion to dismiss; nor did the parties mention it in their briefs or arguments to this court.

Defendants contend for the first time on rehearing that the Committee's grading formula "was submitted to the Court, reviewed by the Court, and accepted by the Court." In response, Ronwin has tendered to this court what purports to be the letter the Committee filed with the Supreme Court on February 8, 1974 pursuant to Rule 28(c)(VII)(B). If, as Ronwin alleges, the Committee scored the examination to admit a pre-determined number of applicants, the letter does not so advise the court. Accordingly, if the letter presented to us constitutes the submission to the Supreme Court, it cannot be the basis for a clearly articulated and affirmatively expressed state policy. Although dismissal might have been proper if the facts were as defendants now argue

for the first time on rehearing, those facts were never brought to the district court's attention. Dismissal was therefore improper on the basis of the information before the district court.

Our resolution of the state-action issue is not inconsistent with this court's prior decisions in Hackin v. Lockwood, 361 F.2d 499 (9th Cir. 1966); Chaney v. State Bar of California, 386 F.2d 962 (9th Cir. 1967), cert. denied, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968); and Brown v. Board of Bar Examiners, 623 F.2d 605 (9th Cir. 1980). Those decisions do not support the contention that bar grading procedures are always shielded by state-action immunity, that such procedures may be challenged only on constitutional

grounds, or that the Arizona Supreme Court was the proper defendant in this case. Those cases did not involve antitrust challenges to bar grading procedures. The plaintiffs in all three cases based their claims on alleged violations of their individual constitutional rights.^{1/}

^{1/} The statement in Brown that "the only constraints on the states' exclusive jurisdiction [over bar admission matters] are constitutional in nature . . .," 623 F.2d at 609, refers to § 1343 actions like those at issue in Brown, Hacking, and Chaney because, as the Brown court notes in the very next sentence: "federal courts are granted jurisdiction under 28 U.S.C. § 1343 to vindicate [only] constitutional rights." This jurisdictional limitation stems from the express language of § 1343, not from the fact that the plaintiff was challenging a bar admission policy. One need look no farther than Goldfarb, where the Court held that the minimum-fee schedule enforced by the state bar violated § 1 of the
(Continued on next page)

The national policy in favor of competition, Midcal, 445 U.S. at 106, 100 S.Ct. at 943, should not be

(Continued from previous page)
Sherman Act, to see that Ronwin's complaint established subject-matter jurisdiction under Federal antitrust laws.

Similarly, a careful reading of the three decisions reveals that they do not hold that a state supreme court is the only proper defendant in challenges to bar grading procedures. As the court explained in Brown, the state supreme court is the proper party when it has promulgated the specific challenged rule. 623 F.2d at 608 n.6.

In Hackin, as the Brown court noted, the court emphasized that the admission rule at issue, barring graduates of unaccredited law schools from taking the bar exam, was directly promulgated and enforced by the state supreme court. 361 F.2d at 500-01. In Chaney, the court's discussion clearly concerns finality and the nature of the plaintiff's claim, and has no relevance to the issues of state action or proper parties. See 386 F.2d at 966-67. It should also be noted that the Chaney court discusses
(Continued on next page)

thwarted absent a clear articulation by the Arizona Supreme Court that it had adopted the alleged grading policy. Absent such a declaration, Ronwin should not have been denied the opportunity to prove that the grading policy was designed to limit competition among Arizona attorneys, as opposed to being designed to ensure that attorneys had the necessary qualifications. Thus, Ronwin's action should not have been dismissed on the ground that the defendants enjoy absolute state-action immunity.

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the plaintiff's restraint of trade contention (similar to Ronwin's claim) at length, and rejects it on factual rather than jurisdictional grounds. Id. at 965. Thus, these decisions offer no support for the contention that there is a blanket rule making state supreme courts the only proper defendants in all bar admissions cases.

B. Subject Matter Jurisdiction--
Interstate Commerce

The Sherman Act's requirement of interstate commerce, 15 U.S.C. § 1, is jurisdictional. See Western Waste Service Systems v. Universal Waste Control, 616 F.2d 1094, 1097 (9th Cir.), cert. denied, 449 U.S. 869, 101 S.Ct. 205, 66 L.Ed.2d 88 (1980); see generally McLain v. Real Estate Board, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980). The district court evidently found that the alleged restraint did not affect interstate commerce so as to invoke jurisdiction under the Sherman Act. Defendants contend that the jurisdictional requirement of the Sherman Act was not satisfied by Ronwin's complaint because bar admission is a purely local matter. Ronwin responds that

the services of Arizona lawyers are required by people living outside Arizona. The price paid by these out-of-state clients for legal services performed by Arizona lawyers is, according to Ronwin, higher than it would be if the number of Arizona lawyers had not been artificially restricted.

In order to establish jurisdiction under the antitrust laws, a plaintiff must establish that the defendant's activity either (1) is itself in commerce or (2) "has an effect on some other appreciable activity demonstrably in interstate commerce." McLain, 444 U.S. at 242, 100 S.Ct. at 509 (emphasis added). Because of the past confusion surrounding these tests, we will consider Ronwin's allegations of interstate commerce

under both the "in commerce" and the "effect on commerce" tests. See Bain v. Henderson, 621 F.2d 959, 960 n.1 (9th Cir. 1980).

(1) The "in commerce" test: The most applicable Supreme Court decision applying the "in commerce" test is Goldfarb v. Virginia State Bar, 421 U.S. at 783-86, 95 S.Ct. at 2011-12. In Goldfarb, plaintiffs alleged that the Virginia State Bar was fixing the prices charged by lawyers handling real estate transactions. In upholding jurisdiction, the Court noted that the real estate transactions that require legal services are frequently interstate transactions. 421 U.S. at 783-84, 95 S.Ct. at 2011-12. The Court reasoned that any restraint on those services therefore had a substantial effect on

interstate commerce. Id. at 785, 95 S.Ct. at 2012.

Ronwin did not specifically plead which interstate transactions require legal services. See Bain, 621 F.2d at 961. Nor did he indicate how substantial an effect on interstate commerce results from restricting the number of lawyers practicing in Arizona. It is not inconceivable, however, that he could establish that legal services constitute an indispensable and inseparable component of certain interstate transactions. Therefore, the district court erred in dismissing the complaint for that reason at this stage of the proceedings. See McLain, 444 U.S. at 246, 100 S.Ct. at 511 (a complaint should not be dismissed unless it appears beyond doubt that

the plaintiff can prove no set of facts that would entitle him to relief).

(2) The "effect on commerce" test: In McLain, plaintiffs charged that various New Orleans-based real estate brokers were engaged in a price-fixing conspiracy. The Court held that plaintiffs had alleged facts sufficient to show that defendants' conduct affected interstate commerce.^{1/} McLain, 444 U.S. at 245, 100 S.Ct. at 510. Specifically, the Court noted indications in the record that: (1) "an appreciable

^{1/} The Court specifically stated that a party need only show that a defendant's general business, as opposed to the alleged illegal conduct, affected interstate commerce in order to meet the jurisdictional requirement. McLain, 444 U.S. 242, 100 S.Ct. at 509.

amount of commerce [was] involved in the financing of residential property in the Greater New Orleans area" and the commerce involved various interstate institutions, id. at 245, 100 S.Ct. at 510; and (2) the activities of the real estate brokers, by affecting the terms and frequency of local real estate transactions, could have a "not insubstantial effect on interstate commerce." Id. at 246, 100 S.Ct. at 511.

Ronwin did not allege either that there are an appreciable number of interstate transactions taking place in Arizona that require legal services or that limiting the number of lawyers has a not insubstantial effect on the number or size of these transactions. However, as is also true under the "in commerce" test, it is not inconceivable

that Ronwin could establish jurisdiction under the "effect on commerce" test. See, e.g., McLain, 444 U.S. at 245-47, 100 S.Ct. at 510-11; Western Waste Service, 616 F.2d at 1097-99. Therefore, on remand, the district court should give Ronwin the opportunity to prove that his complaint meets the jurisdictional requirements under either of these tests.

C. Standing

In order to have standing to maintain a private antitrust action, a party must allege injury to the party's business or property occurring by reason of the alleged antitrust violation. 15 U.S.C. § 15; Solinger v. A&M Records, Inc., 586 F.2d 1304, 1309 (9th Cir. 1978), cert. denied, 441 U.S. 908, 99 S.Ct. 1999, 60

L.Ed.2d 377 (1979). Defendants contend that even if they committed an antitrust violation, the violation did not cause Ronwin injury because he was subsequently found mentally unfit to engage in the practice of law. Thus, according to defendants, even if Ronwin had passed the exam, he would not have been admitted to practice in Arizona.

The flaw in the defendants' argument is that Ronwin was not found mentally unfit to practice law by the Arizona Supreme Court until July of 1976, twenty-seven months after Ronwin's exam results were released.^{1/}

^{1/} Although the Committee on Examinations and Admissions declined to certify that Ronwin was "mentally fit" to practice law when he applied to retake the bar exam in July, 1974, (Continued on next page)

If Ronwin had passed the exam, he arguably would have been able to practice law until he was found, by final decision, to be mentally unfit. Because defendants' alleged illegal restraint precluded Ronwin from practicing law in Arizona for an appreciable period of time, Ronwin has sufficiently alleged that he was injured by reason of an unlawful

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and the special committee appointed by the Arizona Supreme court upheld that determination on January 21, 1975, it was not until July, 1976 that the Arizona Supreme Court affirmed the finding. Application of Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976), cert. denied, 430 U.S. 907, 97 S.Ct. 1178, 51 L.Ed.2d 583 (1977). Defendants do not contend either that Ronwin would have been denied admission in 1974 because of his alleged unfitness to practice had he passed the exam or that he would not have been allowed to practice law pending the Arizona's court decision on the matter. It would be inappropriate for this court to speculate on the matter.

practice. See Kapp v. National Football League, 586 F.2d 644, 648 (9th Cir. 1978), cert. denied, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). Cf. Solinger, 586 F.2d at 1311 (prospective purchaser of company has standing to sue companies that allegedly foreclosed his ability to enter market). Although his allegations of damages suffice to confer standing, Ronwin will still have to prove that defendants' actions caused him actual damages in order to recover.^{2/}

^{2/} Assuming that Ronwin is able to clear the various hurdles still before him, it may be necessary to determine whether he would have passed the bar examination if graded on a proper basis. If the 1974 bar exam may still be impartially regraded to ascertain whether Ronwin would have received a passing grade, but for the alleged (Continued on next page)

III

THE RECUSAL QUESTION

Ronwin appeals the denial of his recusal motion. The district judge was also presiding at that time over other actions in which Ronwin was a

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improper method of restricting bar admission, the district court may so order and supervise such a procedure for the sole purpose of determining whether Ronwin has been damaged. If the court decides that such a remedy is no longer feasible under the circumstances of this case, it would be justified in presuming that he would have passed for the purpose of ascertaining damages, if any. The amount of damages would be limited to Ronwin's loss of earnings, between April, 1974 when he would have been admitted to the Bar, and July, 1976, when the Arizona Supreme Court found him unfit to practice law. See Murphy Tugboat Co. v. Crowley, 658 F.2d 1256, 1260 (9th Cir. 1981) (special solicitude for proof of damages when defendant's conduct has been a factor in speculative nature of damages), cert. denied, ____ U.S. ____, 102 S.Ct. 1713, 72 L.Ed.2d 135 (1982).

party. Ronwin set forth, in various affidavits and motions, facts which he contends indicated that the judge was biased and prejudiced against him. He contends that the judge was therefore required to recuse himself pursuant to 28 U.S.C. §§ 144 and 455.^{10/}

^{10/} 28 U.S.C. § 144 provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the
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The test for disqualification is the same under sections 144 and 455(b)(1). United States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980).

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proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Under this section, the district judge must accept the truth of the factual assertions in the affidavit and determine only whether the affidavit is legally sufficient. See United States v. Azhocar, 581 F.2d 735, 739 (9th Cir. 1978), cert. denied, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979).

28 U.S.C. § 455 provides, in part, that:

- (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
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That test is whether "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States v. Winston, 613 F.2d 221, 222 (9th Cir. 1980). In evaluating a judge's impartiality, the bias or prejudice "must stem from an extra judicial source." Azhocar, 581 F.2d at 739 (emphasis in original). We review the denial of a recusal motion for abuse of discretion. Sibla, 624 F.2d at 868-69.

Ronwin's specific allegations of bias or prejudice involve judicial acts which the district judge either

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(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party

performed or failed to perform while presiding over the other actions in which Ronwin was a party. None of these actions involved extra-judicial acts which would indicate, on their face, prejudice or bias. Adverse rulings by themselves do not constitute the requisite bias or prejudice. Azhocar, 581 F.2d at 738-39. Ronwin also contends that the judge was prejudiced against him because the judge was a defendant in an action brought by Ronwin. However, "[a] judge is not disqualified merely because a litigant sues or threatens to sue him." United States v. Grismore, 564 F.2d 929, 933 (10th Cir. 1977), cert. denied, 435 U.S. 954, 98 S.Ct. 1586, 55 L.Ed.2d 806 (1978). Such an easy method for obtaining disqualification should not be encouraged or allowed.

Finally, Ronwin contends that the judge's alleged participation in ex parte communications with defense counsel indicated the judge's prejudice. Although a judge is generally required to accept the truth of the factual assertions in an Affidavit of Bias filed pursuant to 28 U.S.C. § 144, Azhocar, 581 F.2d at 739, Ronwin's allegation of ex parte communications relates to facts that were peculiarly within the judge's knowledge.^{11/} Given the judge's

^{11/} Ronwin's allegation of ex parte communication between the judge and defense counsel was based on the fact that the counsel, in setting a hearing date on defendants' motion to dismiss, knew when the judge would be in Phoenix. According to Ronwin, counsel could only have obtained that knowledge through ex parte communications with the judge. Counsel explained, however, that he knew the judge would be in Phoenix on (Continued on next page)

emphatic denial of Ronwin's allegations, and Ronwin's failure to show how such alleged communications indicated the judge's prejudice, the judge did not abuse his discretion by denying Ronwin's motion.

IV

CONCLUSION

We conclude that the district court did not abuse its discretion in denying the motion for recusal. We also conclude, however, that the court erred in dismissing the action as to the individual Committee members, and remand for further

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the day he suggested for a hearing because he had received an order from the court in another case assigned to the judge setting the same date for a hearing in the other case.

proceedings consistent with this opinion.^{12/}

AFFIRMED in part; REVERSED in part, and REMANDED.

FERGUSON, Circuit Judge, dissenting:

It is now the law in this circuit that a person who has been judicially determined to be mentally unable to engage in the practice of law in the State of Arizona may still maintain a \$1,200,000 damage action under the federal antitrust laws against the Committee on Examinations and Admissions of the Arizona Supreme

^{12/} We note that many of the remaining issues may be suitable for resolution by means of summary judgment.

Court and the Committee's members^{1/}
 for failure to give him a passing
 grade on the state bar examination!

^{1/} The majority has dismissed spouses of the committee members for the perplexing reason that no specific allegations of wrongdoing have been made against the spouses. Maj. op., note 1, ante. However, in Arizona plaintiffs join spouses as defendants to reach their community property, not because the spouses are wrongdoers. A.R.S. § 25-215 requires that a cause of action based upon a community obligation be brought against both husband and wife. Eng v. Stein, 123 Ariz. 343, 599 P.2d 796 (1979). A community obligation is incurred when, for example, a husband's tort is committed in furtherance of the community's interest. Howe v. Haught, 11 Ariz. App. 98, 462 P.2d 395 (1969). In fact, plaintiff pleaded, "The male Defendants all acted on their own behalves and on behalf of their respective marital communities." Whether defendants actually acted on behalf of their marital communities is a question that the district court did not address and that the majority does not address. Since the case is remanded, resolution (Continued on next page)

Precedents in this circuit and the Supreme Court mandate that when the grading procedures of the board of bar examiners are challenged, such a challenge must be brought against the state supreme court as defendant. Moreover, because the action of the state supreme court is state action within the Parker exception, that action is immune to an antitrust attack. Further, the impact of the

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of this material issue should have been left to the district court. That plaintiff did not specifically allege that defendants' spouses are wrongdoers is wholly immaterial.

The majority's expansive interpretation of antitrust law contrasts nicely with its restrictive view of plaintiff's remedies. The effect of dismissing defendants' spouses from the action is that now plaintiff may recover only from the separate property of defendants. See Eng v. Stein, supra, 123 Ariz. at 346, 599 P.2d at 799.

actions alleged by plaintiff are insubstantial and thus outside the antitrust laws. Consequently, I dissent from the majority's conclusion that the antitrust laws apply to this bar examination matter.

I. CHALLENGE TO DENIAL OF BAR
ADMISSION.

A. Proper Defendant

A state's discretion over rules for admission to legal practice is vested in the judiciary, or the legislature. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). In Hackin v. Lockwood, 361 F.2d 499 (9th Cir.), cert. denied, 385 U.S. 960, 87 S.Ct. 396, 17 L.Ed.2d 305 (1966), we held that the power to grant or deny admission to the bar is vested in the Arizona Supreme Court.

Hence, the State Committee on Examinations and Admissions was not a proper defendant because it was merely a committee of the Arizona Supreme Court with powers delegated by the court. Id. at 500.

In Hackin, plaintiff, the graduate of an unaccredited law school, could not take the bar because a state bar rule allowed only graduates of accredited law schools to take the bar. Plaintiff sued the justices of the Arizona Supreme Court, the State Bar of Arizona, and the Committee on Examinations and Admissions. In holding that the state bar and the Committee on Examinations and Admissions were improper defendants, the court explained:

The State Bar of Arizona is not an appropriate party to the suit because it cannot promulgate or change the

rules governing admission to practice in Arizona. Its Board of Governors can suggest rules to the Arizona Supreme Court, and can enforce them, but only with the approval of the Arizona Supreme Court. . . .

In the original complaint, but not in the amended complaint, appellant names as a defendant the "Committee on Examinations and Admissions," presumably of the State Bar. This is not a committee of the State Bar, but a committee named by the Supreme Court of Arizona, made up of members of the Arizona State Bar, Rule 28(a). Thus we find the power to grant or deny admission is vested solely in the Arizona Supreme Court.
. . . .

361 F.2d at 499 (9th Cir. 1966).

Considering a similar admissions procedure, the court reiterated this conclusion in Chaney v. State Bar of California, 386 F.2d 962 (9th Cir. 1967), cert. denied, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed.2d 162 (1968). In that case, we held that the refusal

of the State Bar Committee to certify an applicant was not a terminative step in the admissions process. Because final decision is vested in the state supreme court, the committee's decision not to admit had no "fixative" status until the court approved or rejected the Committee's recommendation. Id. at 966. Once a decision is final, the supreme court is the proper defendant when a party complains about examination procedures. Thus, the Committee cannot be a party because it is merely an arm of the state supreme court "for the purposes of assisting in matters of admission . . .," which matters remain ultimately in the court. Id. If the plaintiff is deprived of a right, it is the state supreme court, not the Committee on Examinations and

Admissions, that is the source of the deprivation.

These decisions were reaffirmed in Brown v. Board of Bar Examiners, 623 F.2d 605 (9th Cir. 1980). The Bar Examiners of Nevada were found to be an improper party for the reason articulated in Hackin and reemphasized in Chaney,^{1/} id. at 608. See also

^{1/} In Brown, a graduate of an unaccredited law school sued the Nevada Supreme Court, State Bar, and Board of Bar Examiners to allow her to sit for the bar. The district court dismissed the State Bar and the Board of Bar Examiners as improper parties under Hackin, yet issued an injunction against them. 623 F.2d at 608. In allowing the bar and the board to appeal, the court of appeals explained:

We see no logic in the district court's novel rulings which currently dismissed appellants and yet granted specific relief against them. Whatever the rationale, however, appellants should not be denied appellate review of orders by which they are aggrieved.

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Whitfield v. Illinois Board of Law
Examiners, 504 F.2d 474 (7th Cir.
1974) (reaching similar conclusion).

The harm suffered by the plaintiff,
if any, is that resulting from the
Arizona Supreme Court's refusal to
admit him to the bar. Accordingly,
Ronwin cannot sue the Committee on

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Id. Clearly, the court allowed the
two parties to appeal because they
were aggrieved. In dictum, the court
said that Hackin, involving a
challenge to the validity of a state
supreme court rule governing admission
to the bar, did not apply to make the
state bar and the board improper
defendants, since these were the only
parties who could "physically comply"
with an injunction requiring the
defendants to let the plaintiff sit
for the bar. Id. at 608 & 608 n.6.
Even assuming the correctness of that
dictum, it has no application to this
case. Ronwin complains not of the
failure of the state bar to seat him
for the exam -- he failed it -- but of
the failure of the supreme court to
admit him. Admission to the bar is
within the province of the supreme
court, not the state bar, nor the
committee.

Examinations and Admissions of the Arizona Supreme Court.

B. Limitations on Challenges

Court review of state procedures for admission and testing is guided by the rationale basis standard. Chaney v. State Bar, supra, at 964; Tyler v. Vickery, 517 F.2d 1089, 1099 (5th Cir. 1975), cert. denied, 426 U.S. 940, 96 S.Ct. 2660, 49 L.Ed.2d 393 (1976).^{1/}

^{1/} A variety of discretionary practices have been sanctioned by the courts. Statutes permitting admission without examination are valid. Shenfield v. Prather, 387 F.Supp. 676 (N.D. Miss. 1974). A state may validly require an applicant to pass an examination in essay form. Chaney v. State Bar, supra. A state may allow state graduates to waive examination without denying equal protection to other applicants. Huffman v. Montana Supreme Court, 372 F.Supp. 1175 (D.C. Mont.), aff'd, 419 U.S. 955, 95 S.Ct. 216, 42 L.Ed.2d 172 (1974). A board of bar examiners may validly meet to review borderline failure after all scores are
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While the discretion granted to states and bar examiners is broad, the opportunity to practice law is protected by the due process and equal protection clauses of the fourteenth amendment. Willner v. Committee on Character & Fitness, 373 U.S. 96, 102, 83 S.Ct. 1175, 1179, 10 L.Ed.2d 224 (1963). Brown v. Board of Bar Examiners, supra, established a definite procedure for challenging admission practices. Noting that admission procedures are purely a matter of local concern, Brown stated, "The only constraints on the states'

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tabulated. Hooban v. Board of Governors of Washington State Bar Ass'n, 85 Wash. 2d 774, 539 P.2d 686, app. dism'd, 424 U.S. 902, 96 S.Ct. 1092, 47 L.Ed.2d 306 (1976). Subjective grading by examiner is allowed. Tyler v. Vickery, supra.

exclusive jurisdiction are constitutional in nature. . . ." 623 F.2d at 609.

Brown outlined the alternatives available to an unsuccessful applicant:

Since federal courts are granted jurisdiction under 28 U.S.C. § 1343 to vindicate constitutional rights, an issue arises as to the extent of a federal court's authority to participate in what is primarily a state concern. A dichotomy has developed between two kinds of constitutional attack which might be pursued by an unsuccessful bar applicant: "The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission." Doe v. Pringle, 550 F.2d 596, 597 (10th Cir. 1976), cert. denied, 431 U.S. 916, 97 S.Ct. 2197, 53 L.Ed.2d 227 (1977).

In the first type of attack, federal district courts may assert jurisdiction under § 1343 to ensure that generally applicable rules of procedure do not impinge on constitutionally protected rights. Federal courts have

frequently entertained challenges to rules controlling admission to the bar, and have almost without exception sustained the validity of such rules. [Citations omitted].

On the other hand, a state court's decision on an individual application may not be disturbed in an original suit in federal district court. "[O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court" Mackay v. Nesbett, 412 F.2d 846 (9th Cir.), cert. denied, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969). In exercising its judgment on an individual petition, a state supreme court performs a judicial act. In re Summers, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945), reviewable in the Supreme Court. See Schwartz v. Board of Bar Examiners, supra, 353 U.S. at 238, 77 S.Ct. at 755; Konigsberg v. State Bar of California, 353 U.S. 252, 258, 77 S.Ct. 722, 725, 1 L.Ed.2d 810 (1957). A federal district court, in contrast, does not sit as an appellate court and therefore lacks jurisdiction to review

state court actions denying admission to the bar, even though the denial allegedly involves deprivation of constitutional rights.

Brown, supra, at 609-10 (citations omitted). The plaintiff in Brown attempted the only viable challenge to state bar admission procedures -- a constitutional challenge. Brown denied jurisdiction because the plaintiff presented a claim of individual constitutional deprivation and the prayer for relief sought individual redress including monetary damages. Hence, the court found that the claim was not cognizable in district court. Brown, supra, at 611.

C. The Majority Opinion

The opinion disregards the tradition of deference to state discretion in admission procedures. Because such

deference has never existed toward the state's ability to regulate fees, the majority's reliance on Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), is misplaced. Further, the opinion creates an antitrust cause of action where the only challenge that might be appropriate is a constitutional one. Brown, 623 F.2d at 609. Finally, Brown held that a federal district court does not have jurisdiction over a claim against bar examiners because the state court is the real party in interest in admission cases. In addition, jurisdiction is allowed only where the suit alleges arbitrary and capricious procedures violative of due process. 623 F.2d at 610. However, the qualifications for admission in Arizona are "nearly identical" to

those unsuccessfully challenged in Brown. Id. at 610, n.9. Because Ronwin has sued the wrong defendant and because his suit raises no constitutional challenge to admission procedures, binding precedent requires that the district court's dismissal be affirmed.

II. THE ANTITRUST EXEMPTION.

The Parker antitrust exemption is grounded in our federal system:

In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Parker v. Brown, 317 U.S. 341, 351, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943).

The unfortunate effect of the majority

opinion is to attribute to the Sherman Act a congressional intent to limit a state's control over bar admissions.

The proposition for which National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), stands, namely, that federal interference should not extend to essential state functions, is applicable to antitrust cases, in which Congress exercises its powers under the commerce clause. See Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 423, 98 S.Ct. 1123, 1142, 55 L.Ed.2d 364 (1977) (Burger, C.J., concurring in Part I of the Court's opinion and in the judgment); id. at 430, 98 S.Ct. at 1145 (Stewart, J., dissenting). I would think that regulation of bar admissions is an "integral operation in the area of

traditional government functions." See id. at 424, 98 S.Ct. at 1142 (Burger, C.J.). For that very reason, the Arizona Supreme Court oversees bar admissions and delegates authority to its agent. The state must have regulatory authority to examine the fitness and competence of bar applicants. If the state's agents abuse their authority, the proper remedy is a constitutional attack, not an antitrust attack that will undermine the authority that states qua states have to regulate bar admissions.

The majority applies erroneous standards to determine whether an agency of the state, that is, the Committee on Examinations and Admissions of the Arizona Supreme Court, is exempt from antitrust laws.

The majority incorrectly applies a test of compulsion by asking whether the action of the Committee was required by the state supreme court. The majority answers: "Like the defendants in Goldfarb, the defendants here have no statute or Supreme Court Rule to point to as directly requiring the challenged grading procedure." Maj. op., ante, at 696 (emphasis added).

However, the test of compulsion in Goldfarb, supra, applied only to private conduct of the county bar association and to the State Bar's joinder in that private conduct. In Goldfarb, the private county bar association adopted a fee schedule and the State Bar, "by providing that deviation from County Bar minimum fees may lead to disciplinary action . . .

voluntarily joined in what is essentially a private anticompetitive activity." Goldfarb, supra, at 791-92, 95 S.Ct. at 2015-16.

In analyzing the application of the compulsion test to the antitrust immunity of public and private defendants, Professor Areeda has wisely remarked:

The Supreme Court and lower courts have not applied the compulsion language literally. In Midcal, 445 U.S. 97 [100 S.Ct. 937, 63 L.Ed.2d 233] (1980), the Court defined the criteria for immunity not in terms of compulsion but in terms of supervision and articulated state policy; the emphasis on supervision implies public scrutiny, deliberation and review, but not command. Id. at 105-06 [100 S.Ct. at 943-44]. And in Parker, 317 U.S. at 346-47 [63 S.Ct. at 311-12], the anticompetitive output limitations ultimately enforced by public officials originated in proposals from the beneficiaries.

Lower courts employ the rhetoric of compulsion found in Goldfarb and Cantor, but immunize private action that is essential to a state regulatory scheme. . . .

* * *

Compulsion is not necessary in cases of public defendants. Immunity for decisions of subordinate agencies or officials cannot depend on an explicit command from the legislature; delegation of governmental powers necessarily includes the discretion to make decisions not compelled by the legislature.

Areeda, Antitrust Immunity for "State Action" After Lafayette, 95

Harv.L.Rev. 435, 438 n.19, 445 n.49 (1981).

In the instant case, the defendants are the committee and its members, a state agency and officials acting within their general ambit of authority granted by the Arizona Supreme Court. Since the activity of

public defendants is involved, the proper test for antitrust immunity is the one found in City of Lafayette, supra. The plurality in Lafayette concluded that "the Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation." Id. at 413, 98 S.Ct. at 1137. An adequate mandate for state anticompetitive activity exists when it is found, from the authority given a governmental entity to operate in a particular area, that "the kind of action complained of" was contemplated. Id. at 415, 98 S.Ct. at 1138.

Thus, the proper test to apply to the action of the Committee is one of

state authorization, not one of compulsion. In deciding whether the action of the Committee was authorized, it is necessary to consider whether the Committee acted "pursuant to state policy to displace competition with regulation," City of Lafayette, supra, at 413, 98 S.Ct. at 1137, and whether that policy was "clearly articulated and affirmatively expressed." Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 51, 102 S.Ct. 835, 840, 70 L.Ed.2d 810 (1982).^{4/}

^{4/} I recognize that the majority believes an additional element of the immunity test is whether the state policy is "actively supervised by the state itself." Maj. op., ante, at 696. Professor Areeda, however, observes that the Supreme Court has not yet required that governmental acts be supervised by the state. Areeda, Antitrust Immunity for "State (Continued on next page)

There can be no doubt that it was the policy of the Arizona Supreme Court -- and, of course, the policy of

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Action" After Lafayette, 95

Harv.L.Rev. 435, 445 & 445 n.50.

The cases cited by the majority do not apply the supervision test to public defendants -- and, of course, the Committee and its members are such defendants. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978), quotes the "active supervision" language of Bates, without applying any such test. New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 109, 99 S.Ct. 403, 411, 58 L.Ed.2d 361 (1978), makes no mention of an "active supervision" test. California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980) applies the test to a private defendant. Finally, Community Communications Co. v. City of Boulder, ___ U.S. ___, n.14, 102 S.Ct. 841 n.14 (1982), expressly refused to reach the issue of whether active state supervision was required.

Were the Midcal test of "active supervision" to be extended to include public defendants, I have no doubt
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the state's highest court is that of the state, see Bates v. State of Arizona, 433 U.S. 350, 360, 97 S.Ct.

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that the test would be satisfied in the instant case by the Arizona Supreme Court's review. Ariz. Sup. Ct. Rule 28(a) (1970); Ariz. Sup. Ct. Rule 29(c)VII(B) (1974).

The majority declares that a triable issue remains as to whether the submission made by the Committee to the supreme court pursuant to Rule 28(c) was adequate to enable the supreme court to engage in the kind of active supervision which the majority concludes is required before the state action exemption will be available.

Supreme Court Rule 28(c), as in effect at the relevant time, required the Committee to file its grading formula with the supreme court 30 days before the bar examination. As the majority notes, it apparently did not come to the attention of the district court, nor to this court until quite recently, that this rule was in effect at the time the conduct complained of by Ronwin occurred. However, this supreme court rule has the force of law, and the court can -- indeed must -- consider it in deciding whether the Committee's conduct was actively supervised by the court.
(Continued on next page)

2691, 2697, 53 L.Ed.2d 810 (1977) --
to displace competition with
regulation. Indeed, any effort to
limit admission to the bar will limit
the open competition of the market
place. As part of the regulatory
scheme, the supreme court adopted a

(Continued from previous page)

In addition to considering the effect of Rule 28(c), however, the majority has also given weight to evidence not presented to the district court, and indeed not presented to this court until long after oral argument, purporting to bear on the actual nature of the submission made pursuant to Rule 28(c). The record made by the parties in the district court contains no evidence whatsoever that would suggest any failure by the Committee to adequately inform the supreme court of its grading policies and procedures. I find it irregular for the court of appeals to go outside the record to decide an appeal from a dismissal by the district court. As a matter of due process, the parties have a right to have their appeal heard on the basis of the factual record assembled in the court below.

rule directing its Committee to "examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications." Rule 28(a) (1970). Surely this authorization by the Arizona Supreme Court "contemplates" that its Committee would engage in the "kind of action complained of" by plaintiff, namely, the establishment of bar admission standards and grading procedures.

The majority relies on Goldfarb, rather than Bates, supra, as analogous to the instant case. Though neither Goldfarb nor Bates is an exact replica of the case at hand, Bates is more directly on point. Goldfarb would be more relevant if, in the instant case, the Arizona Supreme Court had rejected

the Committee's procedures; the state supreme court in Goldfarb had warned the state bar against enforcing the challenged fee schedules. Goldfarb, supra, at 789, 95 S.Ct. at 2014. In contrast, the Arizona Supreme Court approved the procedures challenged here by accepting recommendations for admission based on those procedures.^{1/} This implied validation of the board's grading system renders Bates the more direct and proper analogy.

^{1/} In further contrast, the defendant in the instant case is a public defendant carrying out a state policy, whereas the defendants in Goldfarb were the private county bar and the state bar joining in essentially private activity. See dissent 702 supra.

In Bates, the activity of the state bar was to enforce a prohibition against advertising. There, the state bar was immune because the supreme court had promulgated the rule. The alleged anticompetitive result was to monopolize. In the instant case, the challenged activity is the grading of examinations on a curve. The state supreme court has entrusted the grading of examinations to the state bar. The alleged anticompetitive result is artificially to limit the number of attorneys and thereby to monopolize. The opinion erroneously subjects the state bar to antitrust laws by focusing on the alleged result and ignoring the immunity issue decided in Bates.

The majority has relied on two cases in which no antitrust immunity was

found for cities charged with antitrust violations. City of Lafayette, supra; City of Boulder, supra. Those cases are inapposite, as they involve actions by cities. Such actions deserve close scrutiny, as there is justifiable concern that a city may advance local, parochial interests, rather than the interests of the people of a state. The federalist compromise, of course, only provides antitrust immunity where the state's interests are concerned. In the instant case, however, an arm of the state supreme court, not a city, is doing the regulating. Moreover, the regulation concerns a matter of statewide interest -- the qualifications of admittees to the bar -- not a matter of local concern. The regulation of admission to the bar is

at the core of the state's power to protect the public.

City of Boulder, supra, actually lends support to the position that antitrust immunity should apply in the case at hand. In explaining why antitrust immunity should not be conferred on a city exercising home rule powers granted by the legislature, the Court in City of Boulder stated:

[P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers granted," since the term, "granted,"

necessarily implies
affirmative addressing of the
subject by the State.

City of Boulder, supra, 455 U.S. at
55, 102 S.Ct. at 843 (emphasis in
original). By no stretch of the
imagination has the Arizona Supreme
Court taken a position of "neutrality"
allowing the Committee to do as it
pleases. To the contrary, the Arizona
Supreme Court has affirmatively
addressed the subject matter of this
suit by granting to the Committee the
power to examine applicants and to
recommend for admission to the bar
those who are found to have the
necessary qualifications.^{§'}

^{§'} Arizona Supreme Court Rule 28(a)
(1970), which assigns to the Committee
the duty of screening applicants,
provides in pertinent part:
(Continued on next page)

I am concerned that the majority, by holding that the anticompetitive action in this case was not authorized by the state and is not shielded by the state antitrust immunity, has opened wide the door to antitrust scrutiny of virtually all acts by agents and officials of the state who carry out policies of statewide concern. The foreseeable consequence

(Continued from previous page)

The Committee shall examine applicants and recommend to this Court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this Court respecting examinations and admissions. . . . The Court will then consider the recommendations and either grant or deny admission.

of multiplication of antitrust actions accompanied by the threat of treble damages will be timorous decision-making by state officials entrusted with the public interest. The day when every act of an agent or official of the state who has been delegated power pursuant to state policy becomes subject to scrutiny for violation of the antitrust laws will be the day that our federalism has become gravely weakened.

III. ALLEGED IMPACT ON COMMERCE.

In order to prevail in an antitrust suit, a party must demonstrate an effect on commerce which is "more than trivial" in the relevant market. Gough v.

Rossmore Corp., 585 F.2d 381, 389
(9th Cir. 1978), cert. denied,
440 U.S. 936, 99 S.Ct. 1280, 59
L.Ed.2d 494 (1979). Plaintiff's
complaint neither identifies a
relevant market nor alleges a
substantial impact on such a
market. A court should give a
party the opportunity to
demonstrate the elements of his
case if his claim presents the
possibility that he may prove
substantial impact. However, on
the facts of this case, plaintiff
could not demonstrate more than
the trivial impact of a curved
grading system. The ability of
applicants to reapply permits
them to remain within the
potential commerce stream.

In addition, the opinion relies on McLain v. Real Estate Board, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980), for the proposition that Ronwin could "conceivably" demonstrate impact on the relevant market. The relevant market in this case, however, while not defined before the district court, is a broad and diffuse market that is not analogous to the well-defined property market in New Orleans with a specific percentage of out-of-state contractors. Without more, the conclusion of a conceivable impact in Ronwin does not flow from the facts of McLain.

CONCLUSION

For the foregoing reasons, I dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD RONWIN,)	
)	
Plaintiff-)	
Appellant,	)	No. 80-5004 D.C.
	)	#CIV 78-193
v.)	
)	
STATE BAR OF ARIZONA)		<u>O R D E R</u>
ARIZONA,)	
CARLOCK GEORGE)	
READ and WANDA MYERS)		
ROBERT D. and JUDITH)		
WOLFINGER, HAROLD J.)		
and JANE DOE)	
RICHMOND, JAMES L.)	
and JANE DOE HOOVER,)	
CHARLES R. and JANE)	
DOE,)	
)	
Defendants-)	
Appellees.)	
)	

Before: FERGUSON and BOOCHEVER,
 Circuit Judges, and
 HATTER,* District Judge.

A majority of the panel in
the above case has voted to deny the
petition for rehearing and to reject
the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and, upon a call for a vote, the en banc call failed to receive a majority of votes of the eligible judges.

The petition for rehearing is denied and the suggestion for rehearing en banc is denied.

*Honorable Terry J. Hatter, Jr.,
United States District Judge for the
Central District of California,
sitting by designation.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD RONWIN,)	
)	
Plaintiff-)	
Appellant,)	
)	
vs.)	
)	
STATE OF ARIZONA,)	
CARLOCK, GEORGE READ	)	No. <u>80-5004</u>
and WANDA MYERS,)	
ROBERT D. and JUDITH	)	DC CV 78-193 MLR
WOLFINGER, HAROLD J.)	
and JANE DOE RICHMOND,)	
JAMES L. and JANE DOE)	
KARMAN, HOWARD H. and)	
JANE DOE HOOVER,)	
CHARLES R. and JANE)	
DOE,)	
)	
Defendants-)	
Appellees.)	

APPEAL from the United States
District Court for the District of
ARIZONA (Phoenix)

THIS CAUSE came on to be heard on
the Transcript of the Record from the

United States District Court for the District of ARIZONA (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said District Court in this Cause be, and hereby is affirmed in part; reversed in part and remanded.

z/

Filed and entered September 8, 1982

z/Attestation of December 10, 1982
deleted.

MAR 24 1983

ALEXANDER L. STEVAS.
~~CLERK~~

No. 82-1474

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES R. HOOVER, HOWARD H. KARMAN,
ROBERT D. MYERS and HAROLD J. WOLFINGER,

Petitioners,

vs.

EDWARD RONWIN,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

EDWARD RONWIN
P.O. Box 3585
Urbandale, Iowa 50322
(515) 223-8819
Respondent pro se

QUESTIONS PRESENTED FOR REVIEW

1. Was the grading procedure employed by petitioners for the February, 1974 Arizona State Bar examination clearly articulated and affirmatively expressed by the State of Arizona acting as sovereign; and, if so did the sovereign actively supervise the grading?

2. On the assumption, arguendo, that the issue is properly before this Court, as petitioners argue (fn.9, Petition), is the Noerr-Pennington doctrine applicable to petitioners?

OTHER PARTIES BELOW¹

¹Petitioners recognized that the case caption on the Ninth Circuit decision reflects a clerical error, Petition, p.A-1,fn.;; however, petitioners are in error when they claim that the defendants, Slutes, were not served, (said fn. and fn.1, p.1, Petition). The marshal's return of service shows that both Mr. and Mrs. Slutes were served. Ronwin brought the caption error to the Ninth Circuit's attention but the error was not corrected.

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No. 82-1474

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES R. HOOVER, HOWARD H. KARMAN,
ROBERT D. MYERS and HAROLD J. WOLFINGER,
Petitioners,
vs.
EDWARD RONWIN,
Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

STATUTORY PROVISIONS AND RULES INVOLVED
(Additional to those found in the Peti-
tion)

Arizona Supreme Court Rules

(All in Vol. 17A, Arizona Revised Statutes)

Rule 28(c)VIII(in effect in 1974)

The semi-annual examinations in Feb-
ruary and July shall be in writing. All
applicants who receive a grade of seventy

or more in the general examination (all subjects except professional ethics) and who also receive a grade of seventy or more in professional ethics and who are found to be otherwise qualified under these rules shall be recommended for admission to the Bar.

(Adopted April 1, 1967; amended effective Aug. 1, 1970)

Rule 28(c)VIII. EXAMINATION GRADING

The semi-annual examinations shall not be oral. All applicants who receive a passing grade in the general examination and who are found to be otherwise qualified under these Rules shall be recommended for admission to the Bar.

(Added June 10, 1976, effective June 15, 1976; subd. (VIII) amended effective February 14, 1979)

Rule 28(c)VII. EXAMINATION SUBJECTS

A..

(2nd ¶) The Committee on Examinations

may utilize the Multi-State Bar Examination sponsored by the National Conference of Bar Examiners and may utilize such grading or scoring system as the Committee deems appropriate in its discretion.

(Added June 10, 1976, effective June 15, 1976; subd. (VII) (A) amended effective March 17, 1980, subd. (VII) (A) amended December 15, 1981, effective January 1, 1982)

STATEMENT OF THE CASE

While generally correct, Petitioners' Statement of the Case fails to explain that, as recited in Rule 28(c)VIII(1974), p.1,supra, and as pled in the Complaint, (§IV) and as admitted in petitioners' Answer(¶3), the Arizona Supreme Court's announced policy, as petitioners informed Ronwin and the other examinees, was that examinees who achieved the pre-set standard of a grade of 70 or more passed the examination and "...shall be recommended

for admission to the Bar."

Petitioner, Charles R. Hoover himself informed Ronwin that petitioners did not grade on a zero to one hundred scale; rather, petitioners used raw scores (numbers ranging in the level of 600) and after the results were known in raw score terms, a raw score was picked as equal to 70, "thereby the number of Bar applicants who would receive a passing grade depended upon the exact raw score value chosen as equal to 70, rather than [on the] achievement by each Bar applicant of [the] pre-set standard [of 70]," ¶VI, Complaint. That grading procedure was in conflict with the Arizona Supreme Court's expressed policy, Rule 28(c)VIII(1974), and gave rise to the anti-competitive effect challenged by Ronwin.

The last paragraph of petitioners' Statement of the Case, p.5, Petition, carries the implication that the Ninth Cir-

cuit's decision, 686 F.2d 692 was the usual three-member panel decision. However, a majority of the eligible judges of the Ninth Circuit saw no reason to rehear the matter en banc. Thus, said Court's order entered December 2, 1982 denying the second and final Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc recites (2nd ¶):

The full court has been advised of the suggestion for rehearing en banc, and, upon a call for a vote, the en banc call failed to receive a majority of votes of the eligible judges.

See copy of said Order, p.A-1, Appendix.

Ronwin also takes issue with footnote no. 3, p.4, Petition. Ronwin pled, (¶VIII, Complaint):

When Plaintiff complained of the unlawful behavior of the Defendants, recited above, using the procedures provided by the rules of the Supreme Court of Arizona for said purpose, the Defendants without notice, hearing or medical examination, falsely and maliciously labelled the Plaintiff as

'mentally unable to engage in the active and continuous practice of law,' and, denied Plaintiff the right to take the July, 1974 Bar examination.

Proof: defendant, George Read Carlock submitted an affidavit to the Arizona Supreme Court, copy of which is Exhibit C to Ronwin's Response to Appellees' [First] Petition for Rehearing, in which Carlock averred that, inter alia, as Ronwin had charged "...that the Committee's action constituted a conspiracy in violation of Section 1 of the Sherman Act," he [Carlock] "...believed that the Committee could not appropriately find that [Ronwin] was mentally and physically able to engage in the active and continuous practice of law."

Ronwin also noted for the District Court (Ronwin's Response to Defendants' Motion to Dismiss, p.2, ls 2-12; and Appellant's Opening Brief, p. 12,) and for the Ninth Circuit, that:

Indeed it was only after [Ronwin] exercised his First Amendment right and criticized the manner of grading said examination that [Ronwin's] mental fitness [and physical fitness] was first questioned. Thus in his deposition in cause No. CIV 78-214 [District Court], CARLOCK admitted that he had no specific reason to raise the question about [Ronwin's] mental ability, but in attempting to cloth his charge, and that of the Committee he headed, with some credibility, CARLOCK asserted that it was [Ronwin's] attack on the manner of grading which he considered 'wrongheaded' and which gave rise to his, and said Committee's, initiation of the charge that [Ronwin] was not mentally able [and physically able] to practice law.

The vicious assault on Ronwin's mental (and even physical ability-later dropped) ability to practice law originated in lawlessness, and the same lawlessness, and fraud, characterized the hearing and result before the special committee referred to in petitioners' footnote no. 3

Although some elements are outside the immediate record, matters concerning Application of Ronwin, 113 Ariz. 357, 555

P.2d 315 (1976), also referred to in petitioners' footnote no. 3, are given in footnote so that this Court can have a fuller understanding of what occurred in connection with Ronwin's challenge to the 1974 grading process.²

²Application of Ronwin rests on the statement, 555 P.2d at 317:

In summary, there is significant expert testimony in the record to indicate that Ronwin has a "paranoid personality.."

The only expert to testify against Ronwin was a psychologist, Dr. Francis A. Enos. At the hearing on Ronwin's latest application for admission to the Arizona State Bar before the Arizona Supreme Court on December 16, 1982, Justice Francis A. Gordon, Jr., who wrote Application of Ronwin, carried on a discussion with Ronwin. Ronwin read two examples of Enos' perjury, which are in the record of said special committee, to Justice Gordon, who, on being asked, did not deny that Enos lied in his testimony. Neither did Justice Gordon deny that those examples and others of Enos' perjury had been brought to the attention of himself and the Arizona Supreme Court before Application of Ronwin was promulgated; and, that, as against Enos, that Court had the testimony of 3 psychiatrists who reported that Ronwin did not suffer from any mental illness and was not a paranoid personality. Two of those experts also informed the Arizona Supreme Court that the condition of "paranoid personality" was not a serious matter nor did it disable anyone from conducting

REASONS WHY THE WRIT
SHOULD NOT BE GRANTED

1. Was the grading procedure employed by petitioners for the February, 1974 Arizona State Bar examination clearly articulated and affirmatively expressed by the State of Arizona acting as sovereign; and, if so did the sovereign actively supervise the grading?
 - a. The Nature of the Challenged Anti-competitive Behavior

Under Arizona Supreme Court Rule 28(c) VIII (1974), p. 1, supra, which required an examinee to achieve the pre-set stan-

2-cont'd:

normal professional work. Neither did Justice Gordon deny that some 12 Arizona attorneys testified that Ronwin was not mentally ill. The Dean of the Arizona State Univ. Coll. of Law testified to Ronwin's good mental health and legal ability as did another professor. When asked how he could justify the above-quoted statement from Application of Ronwin, Justice Gordon claimed it was "the record." Since Application of Ronwin appeared 4 more experts, making a total of 7 (6 psychiatrists and 1 psychologist) have told the Arizona Supreme Court that Ronwin is not mentally ill and is able to practice law. A total of 20 Arizona attorneys have done likewise. The Iowa Supreme Court, with the record of the Arizona Supreme Court before it in 1977 held Ronwin mentally able to practice law.

When the tactics against dissent common in the Soviet Union are adopted by petitioners and the other defendants, and by the Arizona Supreme Court, this Court should become very concerned.

dard of a passing grade of 70 to obtain recommendation for admission to the Bar, each applicant must necessarily be examined for his own ability in law as measured by the Bar examination. Had petitioners adhered to the mandate of said Rule, some examinees might have failed to achieve the 70 passing mark; hence, they would have been denied admission to the Bar and thereby excluded from competing for legal business. That anti-competitive effect is ancillary to the determination of qualifications of examinees to practice law and was not complained of by Ronwin.

Ronwin's Complaint challenges petitioners' unauthorized grading system. In that system, petitioners used raw scores. After all grading was completed, petitioners picked a specific raw score as equal to 70 and then interpolated raw scores to a scale of 0 to 100. Thus, petitioners

graded the examinees on the February, 1974 Bar examination as a group, rather than for their individual achievement, as was the Committee's obligation under the language of Rule 28(a), pp.2-3, Petition; and, the numbers of "passing examinees" depended directly on which raw score was chosen as equal to 70; the higher that raw score, the less passed and vice versa. In effect, the examination lost its function as a measure of each applicant's own ability to practice law and, instead, became a value to control the numbers of persons allowed to enter the competition for legal business between Arizona and the Several States and foreign countries.

b. Petitioners Acted Outside the
Scope of Their Authority

Petitioners claim that the "...Rules presently in force contain no changes material to the issues herein," fn.2, Petition. That is incorrect. The current

Rule 28(c)VIII, changed after 1974, p.2, supra, requires only a "passing grade." In addition, current Rule 28(c)VII, p.2-3, supra, authorizes the Committee to "...utilize such grading or scoring system as the Committee deems appropriate in its discretion." Those changes are obviously an attempt to avoid the questions raised by this case and they prove that petitioners did not have the authority to use the scoring system employed on the February, 1974 Bar examination and that petitioners were acting beyond the scope of their authority. Consequently, the exact opposite of the quotation from Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L. Ed.2d 810 (1977), found on p. 11, Petition, applies to this case, 433 U.S. at 359-360:

In the instant case,...the challenged restraint is not the affirmative command of the Arizona Supreme Court under its Rules [28(a) and 28(c)VIII(1974)]. That court is the ultimate body wielding the State's power over the practice

of law [citations], and, thus, the restraint [complained of herein was] not 'compelled by direction of the State acting as a sovereign.'

A fortiori, petitioners' course of action was neither "clearly articulated [nor] affirmatively expressed as state policy," City of Lafayette, La. v. La. Power & Light Co., 435 U.W. 389, 410, 98 S.Ct. 1123, 1135 (1978). The quoted phrase, labelled the "Midcal Test", p. 9, Petition, has since been echoed in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S.Ct. 937, 943 (1980) and, recently, in Community Commun. Co. v. City of Boulder, Colo., 455 U.S. 40, 102 S.Ct. 835, 840 (1982); and is essentially the same standard announced in Bates, 433 U.S. at 359-360 and in Goldfarb v. Virginia State Bar, 421 U.S. 773, 791, 95 S.Ct. 2004, 2015, 44 L. Ed.2d 572 (1975).

In this case, it is not the Rule [28(c) VIII(1974), p. 1, supra] adopted by the "sovereign"--The Arizona Supreme Court--which is challenged; rather, it is the unauthorized, anti-competitive approach adopted by petitioners which is challenged. As the Ninth Circuit said, Ronwin v. State Bar of Arizona, 686 F.2d 692 (9 Cir. 1982):

Like defendants in Goldfarb, the defendants here have no statute or Supreme Court Rule to point to as directly requiring the challenged grading procedure.

That observation is emphasized by the nature of the rule changes, pp.2-3, supra, which shows that petitioners absolutely lacked authority to use just any grading or scoring procedure they wished until the change in Rule 28(c)VIII, which occurred subsequent to the February, 1974 Bar examination.

As recognized by the Ninth Circuit, 686 F.2d at 695-696, the foregoing distinguishes this case from Bates and is

"more analogous" to Goldfarb.

c. Petitioners Did Not Seek Approval
Of Their Grading Scheme By The
Arizona Supreme Court

Petitioners assure this Court that, under Rule 28(c) (VII) (B), p. 3, Petition, they were "required to, and did, submit [their] proposed formula for grading the bar examination to the [Arizona] supreme court to secure that court's approval of the formula," p. 15, Petition, which implies that petitioners: (i) submitted their raw score scheme and (ii) received approval thereof from the Arizona Supreme Court. That is deceptive and untrue. The same argument was made by the defendants for the first time to the Ninth Circuit, 686 F.2d at 697. To counter, Ronwin obtained a copy of the report submitted pursuant to said Rule from the Clerk's office of the Arizona Supreme Court and submitted same to the Ninth Circuit, 686 F.2d at 697, see copy on p.A-2, Appendix.

The Ninth Circuit rejected petitioners' argument, 686 F.2d at 697:

..if, as Ronwin alleges, the Committee scored the examination to admit a pre-determined number of applicants, the letter does not so advise the court. Accordingly, if the letter presented to us constitutes the submission to the [Arizona] Supreme Court, it cannot be the basis for a clearly articulated and affirmatively expressed state policy. Although dismissal might have been proper if the facts were as defendants now argue for the first time on rehearing, those facts were never brought to the district court's attention.

d. Petitioners Are Not Entitled to State Action Immunity

In their capacity as members of the Committee, petitioners were not sovereign. The sovereign power in bar matters rests with the Arizona Supreme Court, Bates, 433 U.S. at 359-360. Petitioners would only have immunity if they carried out a "clearly articulated and affirmatively expressed" policy of the Arizona Supreme Court, City of Lafayette, 435 U.S. at 410; Midcal, 445 U.S. at 105; City of Boulder, 102 S.Ct.

at 840, Bates, 433 U.S. at 359-360; and Goldfarb, 421 U.S. at 791. As above, that is not what petitioners did. Petitioners ignored the command of Rule 28(c)VIII(1974), p. 1, supra, and substituted their own unofficial and illegal "rule", whose thrust was anti-competitive, as was the Virginia State Bar's enforcement, ergo, adoption of the not clearly articulated nor affirmatively expressed pricing policy in Goldfarb, 421 U.S. at 790. Most appropriate hereto is the comment in Goldfarb, 421 U.S. at 791:

It is not enough that..anti-competitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as sovereign.

The fact that [petitioners were members of a Committee that was] a state agency for some limited purposes does not create an anti-trust shield that allow[ed petitioners] to foster anticompetitive practices for the benefit of [State Bar members].

Petitioners are not entitled to the state action immunity they claim, pp.15-17, Petition.

e. Petitioners Are Subject To Anti-Trust Suit

The plain response to petitioners' argument that bar matters must arise only in the context of constitutional challenges, pp.5-7, Petition, is ably given by the Ninth Circuit, 686 F.2d at 697-698.

Petitioners predict dire consequences if Ronwin is upheld, pp. 7-8, Petition, including that (i) "federal antitrust review imperils the entire existing system of bar admissions," and that (ii) "the federal courts will, consequently, be clogged with new antitrust actions after each state bar examination."

If the "entire existing system" is as rife with illegality as petitioners' actions, it ought more than be imperilled--it ought be abolished.

Boulder, Colo., also sought refuge in the "clogged" courts claim, which this Court rejected, saying, City of Boulder, 102 S.Ct. at 843:

..and will unduly burden the Federal courts. But this argument is simply an attack upon the wisdom of the longstanding congressional commitment...embodied in the anti-trust laws.

If petitioners, and their successors are so committed to the law, as they ought to be, they will stop violating it. That will "unclog" the courts.

f. State Agencies and State Officials Are Not Immune From the Requirement of Clear Articulation and Affirmative Expression; Nor Are They Immune By Virtue Of Their Status Alone

Petitioners claim that the clear articulation and affirmative expression criterion does not apply to State agencies or to State officials, pp.9-14, Petition. That plainly cannot be since the criterion was applied by this Court in Bates, 433 U.S. at 359-360; Goldfarb, 421 U.S. at 791;

City of Lafayette, 435 U.S. at 410; Midcal, 445 U.S. at 105; City of Boulder, 102 S.Ct. at 840. As the Ninth Circuit observed, 686 F.2d at 697:

..Although the defendants in the United States Supreme Court's state-action decisions were public bodies, or subdivisions of the state, that did not end the Court's analysis. The Court still looked to see whether the challenged restraints were clearly articulated and affirmatively expressed as state policy and were actively supervised by the state acting as sovereign. Thus, for instance, it was not dispositive that the restraints challenged in Parker, Orrin W. Fox, and Midcal were enforced, respectively, by a state commission, a state board, and a state department. [citations]. In City of Lafayette, 435 U.S. at 408, 98 S.Ct. at 1134, a plurality of the Court expressly rejected the argument that the state-action exemption extends to 'all governmental entities, whether state agencies or subdivisions of a State...simply by reason of their status as such.' This position has since been adopted by a majority of the Court. See City of Boulder, 102 S.Ct. at 842.

The line of division, as indicated in City of Boulder, 102 S.Ct. at 842, is

whether or not the particular agency or official is "sovereign." Petitioners are not sovereign; the Arizona Supreme Court is, Bates, 433 U.S. at 360.

g. There Is No Conflict Between The
Circuits

Petitioners argue that the Ninth Circuit decision conflicts with that of other circuits, p.12, Petition.

The rules challenged in Foley v. Alabama State Bar, 648 F.2d 355 (5 Cir. 1981) and in Feldman v. Gardner, 661 F.2d 1295 (D.C.Cir. 1981), cert. den. 102 S.Ct. 3483, cert. granted on another issue, sub. nom. Dist. of Columbia Ct. of Appeals v. Feldman, 102 S.Ct. 3481, were essentially those of the "sovereign" in each case, Foley, 648 F.2d at 359; Feldman, 661 F.2d at 1307. In Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706 (3 Cir. 1978), the Court held that the kind of action that the defendants took was com-

manded, albeit not clearly, by the sovereign, 582 F.2d at 719. The case is not in conflict with Ronwin; if there is any conflict it is with the decisions of this Court, such as in Bates, Goldfarb, Midcal.

In instant cause, petitioners were told to grade on a scale from 0 to 100 and to examine each applicant for his or her own ability to meet or exceed the pre-set standard of a grade of 70, after which petitioners were required to recommend for admission those reaching or exceeding the 70 grade. Instead, petitioners disregarded the clear command of the sovereign and used their own rules. No conflict exists between the circuits.

2. On the assumption, arguendo, that the issue is properly before this Court, as petitioners argue (fn.9, Petition), is the Noerr-Pennington doctrine applicable to petitioners?

Petitioners claim that the Noerr-Pennington doctrine immunizes their recommendations regarding bar admissions, pp.

18-20, Petition.

Sophistry has reached a new height!

Eastern Railroad Presidents Conference

v. Noerr Motor Freight, Inc., 365 U.S.

127, 81 S.Ct. 523 (1961) proceeds on the theme, 365 U.S. at 135:

..that no violation of the Act
can be predicated upon mere at-
tempts to influence the passage
or enforcement of laws.

Noerr drew a distinction between asso-
ciations having as their purpose attempts
to induce "particular action with respect
to a law that would produce a restraint...",
and combinations normally held violative
of the Sherman Act, 365 U.S. at 136.

United Mine Workers of America v. Pen-
nington, 381 U.S. 657, 669, 85 S.Ct. 1585,
1593 (1965) follows Noerr.

The fact situations in both cases are
totally dissimilar to the case at bar and
both cases are inapplicable to this action.
Ronwin has not challenged petitioners'

right protected by Noerr and by Pennington to make a recommendation on Ronwin's application as being violative of anti-trust law; rather, Ronwin has challenged the actual anti-competitive grading scheme employed by petitioners without authorization and in disregard of the policy stated in Rules 28(a) and 28(c)VIII(1974).

Petitioners argue that "Ronwin made no effort to plead that petitioners' acts fell within the 'sham' exception to Noerr-Pennington, and could not do so.," fn. 11, p. 20, Petition.

As petitioners noted, the Noerr-Pennington argument was raised for the first time in two amicus curiae briefs in the Ninth Circuit, fn. 9, p. 18, Petition, --briefs to which Ronwin was not allowed by the Ninth Circuit to respond, see Order of the Ninth Circuit, p. A-3, Appendix, and for that reason Ronwin "made no effort to plead..the 'sham' exception."

Petitioners cite Noerr, as well as Clipper Express v. Rocky Mountain Motor Freight, Inc., 674 F.2d 1252 (9 Cir. 1982), pet. for cert filed, 51 U.S.L.W. 3512 (U.S. Jan. 3, 1983, No. 82-1110), as authority on the 'sham' exception, fn. 11, p. 20, Petition.

The sham exception removes anti-trust immunity when, Clipper, 674 F.2d at 1262:

..the purported effort to influence or obtain government action is in reality only an attempt to interfere with business relationships of a competitor, however, the activity does not enjoy anti-trust immunity (citing Noerr).

Clipper also recognizes that whether "something is a genuine effort to influence governmental action, or a mere sham, is a question of fact," 674 F.2d at 1264.

Since Rule 28(c)VIII(1974), p. 1, supra, states that those who obtain a grade of 70 and otherwise found qualified "..shall be recommended for admission to the Bar,"

petitioners' recommendations are commanded and can hardly be classified as attempts "to influence" judicial policy.

It is also clear from Noerr that the attempts to influence which enjoy immunity are in the nature of "political" efforts. Thus, Noerr explains, 365 U.S. at 140:

Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity.

Petitioners' "recommendations" activity hardly constitutes "political activity."

Whether or not the "sham" exception is applicable to petitioners, petitioners whole attempt to clothe themselves with Noerr-Pennington doctrine immunity is a transparent sham.

CONCLUSION

For the foregoing reasons, the Petition
for Writ of Certiorari should be denied.

Respectfully submitted

Edward Ronwin
P.O. Box 3585
Urbandale, Iowa 50322
(515) 223-8819
Respondent pro se

(Appendices follow)

APPENDIX

A-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 2 1982

EDWARD RONWIN,

Plaintiff-Appellant,

v.

STATE BAR OF ARIZONA, CARLOCK
GEORGE READ and WANDA MYERS,
ROBERT D. and JUDITH WOLFINGER,
HAROLD J. and JANE DOE RICHMOND,
JAMES L. and JANE DOE HOOVER,
CHARLES R. and JANE DOE,

Defendants-Appellees.

No. 80-5004
D.C. #CIV 78-193

PHILLIP D. WINBERRY
CLERK, U.S. COURT OF APPEALS

O R D E R

Before: FERGUSON and BOOCHEVER, Circuit Judges, and HATTER,*
District Judge.

A majority of the panel in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and, upon a call for a vote, the en banc call failed to receive a majority of votes of the eligible judges.

The petition for rehearing is denied and the suggestion for rehearing en banc is denied.

*Honorable Terry J. Hatter, Jr., United States District Judge for the Central District of California, sitting by designation.

COMMITTEE ON EXAMINATIONS AND ADMISSIONS
 SUPREME COURT, STATE OF ARIZONA
 234 N. CENTRAL, SUITE 858
 PHOENIX, ARIZONA 85004
 (602) 252-4804

GEORGE REAS CARLOCK, CHAIRMAN
 PHOENIX

ROBERT D. MYERS, VICE CHAIRMAN
 PHOENIX

M. J. WOLFINGER
 PHOENIX

JAMES L. RICHMOND
 TUCSON

D. THOMPSON BLUES
 TUCSON

HOWARD M. KARMAN
 CADA GRANDE

CHARLES R. HOOVER
 PHOENIX

RECEIVED

FEB - 8 1974

HAYS

February 8, 1974

The Honorable Jack D. H. Hays
 Chief Justice
 Supreme Court of Arizona
 1700 West Washington Street
 Phoenix, Arizona 85007

Dear Chief Justice Hays:

Pursuant to the requirements of Rule VII-B of the Rules for Admission of Applicants to the State Bar of Arizona, as recently amended, this Committee hereby advises the Court, with respect to the February, 1974, examination, that the formula upon which the Multi-State Bar Examination results will be applied with the other portions of the total examination results and the proposed formula for grading the entire examination are as follows:

The results on the Multi-State portion and the essay portion will be correlated by the standard deviation method, the computation being done for the Committee under the supervision of the National Conference of Bar Examiners, and the two portions of the examination will be weighted as follows:

Multi-State	3/7
Essay	4/7

Respectfully submitted,

G. R. Carlock
 G. R. Carlock
 Chairman

GRC:ryt

cc: Members of the Committee
 Mrs. Doris Odom

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD RONWIN,

Plaintiff-Appellant,

v.

STATE BAR OF ARIZONA, CARLOCK GEORGE
READ and WANDA MYERS, ROBERT D. and
JUDITH WOLFINGER, HAROLD J. and JANE
DOE RICHMOND, JAMES L. and JANE DOE
HOOVER, CHARLES R. and JANE DOE,

Defendants-Appellees.

No. 80-5004

D.C. #CIV 78-193

ORDER**FILED**

JUL 29 1982

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

Before: FERGUSON and BOOCHEVER, Circuit Judges, and HATTER,*
District Judge.

It is hereby ordered that:

- (1) all motions presently pending before the court for
Leave to File Amicus Curiae Briefs in support of Appellees'
Petition for Rehearing are granted;
- (2) Appellant's Motion for Leave to File Supplemental
Response to Appellees' Petition for Rehearing is granted;
- (3) Appellees' Petition for Rehearing is granted; and
- (4) the case stands submitted for rehearing on the basis
of the record, briefs, and other material presently before the
court -- including the amicus briefs and the Appellant's
Supplemental Response -- without further filings or additional
oral argument.

*Honorable Terry J. Hatter, Jr., United States District Judge
for the Central District of California, sitting by designation.

APR 23 1983

ALEXANDER L. STEVENS,
CLERK

No. 82-1474

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES R. HOOVER, HOWARD H. KARMAN,
ROBERT D. MYERS and HAROLD J. WOLFINGER,

Petitioners,

vs.

EDWARD RONWIN,

Respondent.

BRIEF IN OPPOSITION TO
PETITIONERS' SUPPLEMENTAL BRIEF RE
PETITION FOR CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD RONWIN
P.O. Box 3585
Urbandale, Iowa 50322
(515) 223-8819
Respondent pro se

No. 82-1474

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES R. HOOVER, HOWARD H. KARMAN,
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BRIEF IN OPPOSITION TO
PETITIONERS' SUPPLEMENTAL BRIEF RE
PETITION FOR CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

On or about April 22, 1983, Petitioners
filed a "Supplemental Brief Re Petition
for Certiorari to the United States Court
of Appeals for the Ninth Circuit" in which
Petitioners argue that this Court's deci-
sion in District of Columbia Court of Ap-
peals v. Feldman, 51 U.S.L.W. 4285 (No.81-

1335) holding that in Bar admission decisions, lower federal courts "do not have jurisdiction...over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional," 51 U.S.L.W. at 4292, justifies summary vacation of this matter.

Petitioners fail to inform this Court that no state court decision is involved. Respondent's Complaint did not ask for admission to the Arizona State Bar and did not challenge a state court decision. The Complaint merely attacked Petitioners' use of a grading process for the February, 1974 Bar examination without authority; indeed, contrary to the express rule of the Arizona Supreme Court, as discussed in Respondent's Brief in Opposition to the Petition for Certiorari¹.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted

Edward Ronwin
P.O. Box 3585
Urbandale, Iowa 50322
(515) 223-8819
Respondent pro se

¹ Respondent filed a "pendent" Cross-Petition for Certiorari, assigned No. 82-1573, based on Rule 19.5 of this Court. On or about April 22, 1983, Petitioners have filed a Brief in Opposition to said Cross-Petition which presents an identical argument to that in Petitioners' Supplemental Brief to which this Brief in Opposition is addressed. Respondent asks this Court in the interest of avoiding accumulation of excess paper and in view of the pendent quality of the Cross-Petition, to consider this Brief in Opposition, or at least the argument made herein, as Respondent's Reply Brief to Petitioner's Brief in Opposition to said Cross-Petition in No. 82-1573.

MOTION FILED
APR 4 1982

No. 82-1474

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CHARLES R. HOOVER, HOWARD H. KARMAN, ROBERT D. MYERS
and HAROLD J. WOLFINGER,
Petitioners,

vs.

EDWARD RONWIN,
Respondent.

**MOTION FOR LEAVE TO FILE
BRIEF OF AMICUS CURIAE
AND
BRIEF OF AMICUS CURIAE IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

Of Counsel:

ALLAN ASHMAN
333 North Michigan Avenue
Suite 1025
Chicago, IL 60601

JOHN F. O'HARA
PARKER, MILLIKEN, CLARK
& O'HARA
333 S. Hope Street,
27th Floor
Los Angeles, CA 90071

JAN T. CHILTON
SEVERSON, WERSON, BERRY
& MELCHIOR
A Professional Corporation
One Embarcadero Center,
25th Floor
San Francisco, CA 94111

KURT W. MELCHIOR
One Embarcadero Center,
25th Floor
San Francisco, CA 94111
(415) 398-3344

*Attorney for Amicus Curiae
National Conference of
Bar Examiners*

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No. 82-1474

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CHARLES R. HOOVER, HOWARD H. KARMAN, ROBERT D. MYERS
and HAROLD J. WOLFINGER,
Petitioners,

VS.

EDWARD RONWIN,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The National Conference of Bar Examiners moves for leave to file the attached Brief of Amicus Curiae in support of the petition for certiorari. Petitioners have consented to the filing of this amicus brief; respondent Ronwin has refused to consent.

The National Conference of Bar Examiners is a national service organization for bar examiners like the petitioners in this case. The National Conference of Bar Examiners has an organizational interest in this case because the holding below will have serious impact on the bar examining process and will create potential liability for the National Conference as the organization which prepares and scores the Multistate Bar Examination and the Multistate Professional Responsibility Examination.

With the court of appeals' permission, the National Conference of Bar Examiners filed amicus curiae briefs in support of each of petitioners' two petitions for rehearing in the Ninth Circuit.

In the attached amicus brief, the National Conference of Bar Examiners shows the nationwide importance of the questions for review raised in the petition for certiorari. The opinion below heralds a new era of federal antitrust review of state bar admissions decisions. As the attached amicus brief demonstrates, such review will have a deleterious effect on the bar examining process. It will also cause an unwarranted and undesirable shift from the state courts to the federal courts of responsibility for determining who shall practice law in each of the 50 states.

The attached amicus brief also demonstrates that the questions raised by the petition for certiorari have importance far beyond the bar examination context. Whether the two-pronged test restated in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) applies to state agencies such as the Arizona Supreme Court's Committee on Examinations and Admissions; if so, whether such agencies may be granted discretion without voiding their state action immunity from antitrust liability; and whether such agencies must be "actively supervised" by "the state" are fundamental issues affecting the antitrust liability of all state agencies, not just boards of bar examiners.

Similarly, the application of the *Noerr-Pennington* doctrine to acts of official advisory boards, such as the Committee on Examinations and Admissions, affects a broad range of state bodies counseling states on a myriad of concerns beyond the grading of bar examinations.

For all of these reasons, the National Conference of Bar Examiners respectfully requests that its motion for leave to file the attached brief of amicus curiae be granted.

Respectfully submitted,

Of Counsel:

ALLAN ASHMAN
333 North Michigan Avenue
Suite 1025
Chicago, IL 60601

JOHN F. O'HARA
PARKER, MILLIKEN, CLARK
& O'HARA
333 S. Hope Street,
27th Floor
Los Angeles, CA 90071

JAN T. CHILTON
SEVERSON, WERSON, BERKE
& MELCHIOR
A Professional Corporation
One Embarcadero Center,
25th Floor
San Francisco, CA 94111

KURT W. MELCHIOR
One Embarcadero Center,
25th Floor
San Francisco, CA 94111
(415) 398-3344
*Attorney for Amicus Curiae
National Conference of
Bar Examiners*

No. 82-1474

In the Supreme Court

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OCTOBER TERM, 1982

CHARLES R. HOOVER, HOWARD H. KARMAN, ROBERT D. MYERS
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Petitioners,

vs.

EDWARD RONWIN,
Respondent.

**BRIEF OF AMICUS CURIAE
NATIONAL CONFERENCE OF BAR EXAMINERS
IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI TO THE
NINTH CIRCUIT COURT OF APPEALS**

Amicus curiae, the National Conference of Bar Examiners ("NCBE"), respectfully submits this brief in support of the petition by Charles R. Hoover, et al., for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

After the petition for certiorari was filed, this Court decided *District of Columbia Court of Appeals v. Feldman*, No. 81-1335 (March 23, 1983), which requires summary vacation and remand. See pp. 10-11 below.

If this Court does not summarily vacate and remand, it should still grant the petition for certiorari. The court of appeals' decision and the questions raised by the petition

for certiorari have nationwide importance for the future application of the federal antitrust laws to all state agencies, and to state bar examiners in particular.

Under the court of appeals' holding, any disappointed bar applicant may obtain review by a federal court of his failing grade on a state bar examination by filing a complaint alleging a conspiracy by the state bar examiners to restrain competition. The holding below applies to all state bar examiners nationwide because the Arizona bar examination is typical of state bar examinations, and the challenged grading procedure is widely used.

The court of appeals' decision to allow federal court review of state bar admissions practices by antitrust actions will have important, adverse consequences. It will deter eminent practitioners from serving as bar examiners and thus lower the quality of the bar examination process. It will substantially increase the federal courts' litigation burden, shifting the final vote on admission to state practice from the states' supreme courts to federal juries.

Beyond the bar examination context, the petition raises fundamental questions concerning the scope of state action immunity from the antitrust laws. Should different tests of state action immunity apply to different state agencies? How much discretion may state agencies be allowed without losing their state action immunity? Must states "actively supervise" their own agencies to preserve their antitrust immunity? This Court has not yet addressed these questions specifically. The resolution of these questions will affect the relationship between the state and federal governments across the entire range of state functions.

The petition also raises the issue whether the *Noerr-Pennington* doctrine protects the activities of state advisory boards. This issue, too, affects state action, and action by parties dealing with the state, in all areas, not just in the grading of bar examinations.

INTEREST OF AMICUS CURIAE

Organized in 1931, the NCBE is a private, nonprofit corporation affiliated with the American Bar Association. The NCBE's membership includes officers and members of boards of bar examiners and of bar character committees of all 50 states, the District of Columbia, Guam, the Virgin Islands and Puerto Rico. The NCBE's membership also includes judges of state courts which control admission of lawyers to practice.

Among the NCBE's objectives are improving the quality of bar examinations, conducting studies and distributing information about bar examinations, and encouraging the maintenance of high standards by state boards of bar examiners. The NCBE also cooperates with other organizations representing the bench, bar and law schools in solving problems relating to legal education and bar admissions.

In cooperation with the American Bar Association and the American Association of Law Schools, the NCBE has promulgated a Code of Recommended Standards for Bar Examiners. The Code's 29 standards cover all aspects of bar examination, from who should serve as a bar examiner to how bar examinations should be graded.

The NCBE has published *The Bar Examiners' Handbook* (S. Duhl, 2d ed. 1980) which provides extended commentary on each of the 29 Recommended Standards for Bar Examiners. The NCBE also publishes a monthly periodical, *The Bar Examiner*, featuring articles by eminent authorities on admission standards and bar examination procedures, and a *Litigation Report*, detailing the progress of and analyzing the issues in litigation against bar examiners. The NCBE holds conventions, seminars and other instructional sessions for bar examiners and judges.

The NCBE maintains a library of more than 6,500 bar examination essay questions. On request, the NCBE sends

questions and model answers to bar examiners throughout the nation for use in preparing bar examinations.

Since 1971, the NCBE has compiled, administered and scored the Multistate Bar Examination ("MBE"). The MBE is a multiple choice examination containing 200 questions covering contracts, torts, constitutional law, criminal law, evidence and real property. At present, 46 states, the District of Columbia and the Virgin Islands use the MBE as part of their bar examination.

The NCBE has recently established the Multistate Professional Responsibility Examination ("MPRE"). First given in 1980, the MPRE is now used in 27 jurisdictions. The MPRE is a 50-question multiple choice test on legal ethics.

The NCBE has an organizational interest in this case because the court of appeals' decision will interfere with the NCBE's goals of improving the quality of bar examinations and of encouraging the maintenance of high professional standards among bar examiners. NCBE also has an interest in the application of the antitrust laws to bar examiners, both on behalf of its bar examiner members and in its own right as the organization which prepares and scores the MBE and MPRE.

ARGUMENT

1. Application of the Antitrust Laws to Bar Examiners Is of Nationwide Importance

The court of appeals' decision requires the district court to review, in a federal antitrust suit, petitioners' grading of the February 1974 Arizona bar examination. The holding is not limited to Arizona or to the particular test respondent Ronwin took. To the contrary, it threatens the bar examination process in every American jurisdiction.

As in Arizona, the highest court in every state holds the ultimate power to grant or deny admission to the bar.

F. Klein, S. Leleiko and J. Mavity, *Bar Admission Rules and Student Practice Rules*, 29 (1978) (hereafter "Bar Admission Rules"). In every state, the highest court has delegated the time-consuming, technical task of administering and grading the bar examination to a board or committee of bar examiners composed of eminent legal practitioners, most of whom volunteer their valuable time and skills. *Id.*, chart IV, pp. 30-33. As in Arizona, the state's highest court appoints its bar examiners in each of 40 states. *Id.*, 37.

Arizona's bar examination, too, is similar to almost every other state's. It includes essay questions, prepared and graded by Arizona's bar examiners, and the MBE, prepared and scored by the NCBE. Like most other states, Arizona has an elaborate review procedure to protect against improper or erroneous grading. *Id.*, chart V, pp. 34-36; *The Bar Examiners' Handbook*, *supra*, 303-309.

Even the particular grading procedure respondent Ronwin attacked is one widely used to assure that bar applicants are graded according to their ability, not according to the difficulty of the particular examination they take. Properly called "scaled scoring," the procedure statistically adjusts for the varying difficulty of different bar examinations.¹ Scaled scores are used in the MBE and MPRE as

¹"In a series of tests, such as the MBE, which are intended to measure levels of competence, it is important to have a standardized score which represents the same level of competence from test to test. The raw score is not dependable for this purpose since the level of difficulty varies from test to test. It is not possible to draft two tests of exactly the same level of difficulty. Scaled scores are obtained by reusing some questions from earlier tests which have been standardized. A statistical analysis of the scores on the reused questions determines how many points are to be added to or subtracted from the raw score to provide an applicant's scaled score. Thus a particular scaled score represents the same level of competence from examination to examination." *The Bar Examiners' Handbook*, *supra*, 61-62.

well as the essay portions of many states' bar examinations. *The Bar Examinations' Handbook*, *supra*, 69-72, 271-282.

Because the February 1974 Arizona bar examination and its grading differed in no substantial respect from the tests given and the grading procedures employed in every other American jurisdiction, the court of appeals' decision will affect the bar admissions process in every state.

The impact of the court of appeals' opinion on the bar admissions process will be far-reaching and unremittingly adverse. "The bar examination seems to be a favorite whipping boy of critics of the system." Bar Admission Rules, 39. Partly as a result, "[o]ver the past 10 years, there has been a proliferation of suits by unsuccessful bar applicants attacking bar examinations on constitutional [and other] grounds." *The Bar Examiners' Handbook*, 26; see cases cited in *id.*, 26-55; Bar Admission Rules, 53-144.

As the petition (pp. 6-7) points out, this rising tide of litigation has been kept in check until now by an inter-related set of judicial rules, the effect of which has been to confine federal review of individual denials of admission to review by this Court on petitions for certiorari and to judge broadscale constitutional attacks on bar examinations by relatively relaxed tests.

Only last week, this Court held that the lower federal courts lack jurisdiction to review, under any legal theory, the order of a state supreme court relating to admission of members of its bar. *District of Columbia Court of Appeals v. Feldman*, *supra*, slip op. at 20-24. Review of such individual bar admissions decisions may be had only in this Court. *Id.*, slip op. at 24. Since Ronwin's complaint sought antitrust review of and damages based on his individual denial of admission, the *Feldman* decision squarely governs this case. The judgment below should be

summarily vacated and remanded for reconsideration in light of *Feldman*. See order in *H.S. Crocker Co. v. Ostrofe*, 51 U.S.L.W. 3633 (U.S., Feb. 28, 1983).

Moreover, the court of appeals' decision will permit dis-appointed bar applicants to easily avoid *Feldman's* strictures. Instead of a review limited to constitutional standards, the court of appeals' opinion allows review under the more stringent rules of the antitrust laws which are intended to serve different purposes. Rather than confining review of individual denials of admission to this Court, see *id.*, slip op. at 20, 23-24, the court of appeals would allow juries in every federal district court to second-guess state bar examiners.

Antitrust review of bar admissions decisions would be extremely burdensome to bar examiners even if they ultimately prevailed. Antitrust claims are easily alleged,² but difficult to resolve before trial. *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962). Antitrust litigation is expensive to defend, normally involving copious discovery and lengthy trials. E. Timberlake, *Federal Treble Damage Antitrust Actions*, § 1.03, p. 2 (1965).

Typically, bar examiners are eminent practitioners "with scholarly attainments and an affirmative interest in legal education," who serve with no or minimal compensation. *The Bar Examiners' Handbook*, pp. 95-97, 99. The court of appeals' decision will discourage such lawyers from serving as bar examiners because of the expense of defending antitrust actions, the threat of liability for treble damages and attorneys fees, and the necessity of spending many hours in depositions, answering interrogatories and preparing defenses.

²See Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv.L.Rev. 435, 451-453 (1981); II P. Areeda & D. Turner, *Antitrust Law*, ¶ 317, pp. 71-84 (1978).

Antitrust review of bar admissions would entail a dramatic and undesirable shift in the relationship between state and federal courts. As respondent Ronwin's litigation history shows, see petition, 3-4 and n. 3; see also *Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981), disappointed bar applicants have the inclination, incentive and ability to pursue indefatigably every available means to secure review of their exclusion from practice.

In 1981, 59,307 applicants took bar examinations in American jurisdictions; 65.9 percent or 39,088 passed. Smith, 1981 Bar Examination Statistics, 51 Bar Examiner 27 (1982). If only five percent of the disappointed bar applicants filed antitrust suits, the federal courts could expect 2000 new antitrust actions each year.

Such an influx of litigation would further clog already overburdened federal dockets. More importantly, it would shift control over admissions from each state's highest court to federal judges and juries.³

Federal court review of failed bar examinations would severely impair the state's "compelling interest" in regulating the practice of law. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 361-362 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). It would also offend settled principles of federalism. See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 400, 415-416 (1978); *National League of Cities v. Usery*, 426 U.S. 833, 842-845, 851-852, 855 (1976); *Younger v. Harris*, 401 U.S. 37, 43-49 (1971). States may not interfere with the federal government's regulation of admission to its bar. *Sperry v.*

³Even if bar examiners always prevailed in such cases, federal review would have an undesirable, chilling effect on state bar examiners' performance of their duties and would entail an equally undesirable post hoc probing of their minds and the reasons for their official decisions. See P. Areeda, *Antitrust Law*, ¶ 203.3d, pp. 18-20 (Supp. 1982).

State of Florida, 373 U.S. 379 (1963). Federal interference with the states' regulation of admission to their bars would equally impair our dual system of government. See *Parker v. Brown*, 317 U.S. 341, 351 (1943).

Nor would antitrust review of state bar admissions practices advance any congressional objective. Admission to state bars is not and will not be determined by the free interplay of economic forces.⁴ Every state has by now replaced "unfettered business freedom," *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978), with regulation in this area in order to protect the public against incompetent would-be attorneys. See Bar Admission Rules, chart V, pp. 34-36. Scrutinizing bar examination grading practices under the antitrust laws will not advance the Sherman Act's objectives, but it will seriously harm the bar examination process and its public protection role.

2. The Petition Presents Important Questions Regarding the Scope of State Action Immunity from the Anti-trust Laws

Resolution of the questions raised by the petition for certiorari is important for state supreme courts and for bar examiners across the country, as demonstrated above.

⁴In an excess of Jacksonian democratic fervor, the 1851 Indiana Constitution proclaimed that every voter of good moral character was entitled to practice law in all courts. This experiment did not last long. *The Bar Examiners' Handbook*, 15. Since then no state has left the practice of law to unregulated competition. Indeed, the long-term trend has been toward stricter regulation and more careful screening of would-be lawyers, not toward greater economic freedom. Karger, *The Role of the NCBE in the Bar Admissions Process: Its First Fifty Years*, 50 *Bar Examiner* 7, 8-9 (1981); see also, Griswold, *In Praise of Bar Examinations*, 60 *A.B.A. J.* 81 (1974); Sprecher, *Fifty Years of Service*, 50 *Bar Examiner* 4, 5 (1981).

In addition, the petition raises three interrelated issues regarding state action immunity from the antitrust laws which are of grave concern to all state officials, whatever their particular functions. Those issues may be rephrased simply as "Who is the State," "How detailed must state authorization be," and "Must the state 'actively supervise' its own agencies" for purposes of state action immunity?⁵

As Professor Areeda has explained:

Other questions remain open after [*City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978)]. The Court did not clearly define which governmental bodies are "the state" and which require "authorization." Nor did it establish the clarity with which "the state" must both authorize an allegedly anticompetitive decision and display its intention to displace the antitrust laws. The answers to these several open questions are interdependent.

Areeda, *supra*, n. 2, 95 Harv.L.Rev. at 441-442.

a. The Arizona Supreme Court's Committee on Examinations and Admissions Is "the State"

City of Lafayette v. Louisiana Power & Light Co., *supra*, and *Community Communications Co. v. City of Boulder*,

⁵These questions are necessarily raised by the petition even if respondent Ronwin were correct in asserting, dehors the record, that the Arizona Supreme Court commanded the Committee on Examinations and Admissions to use a grading formula different from the one the committee actually employed. "Wise and efficient federalism argues against review by antitrust courts of ordinary state agency errors. . . . 'Ordinary' errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control." Areeda, *supra* n. 2, 95 Harv.L.Rev. at 453. As noted, Arizona has a procedure for review of the committee's actions. The procedure, which Ronwin unsuccessfully invoked, see 686 F.2d at 694, is fully adequate to correct the type of error in grading formula which Ronwin alleges.

455 U.S. 40 (1982) hold that municipalities are not "the State" and thus must meet the two-part test restated in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) if they are to secure state action immunity from the antitrust laws. This result follows because the "state action exemption [is] based upon the federalism principle of limited state sovereignty . . . [and] municipalities 'are not themselves sovereign . . .'" *Community Communications Co. v. City of Boulder*, *supra*, 455 U.S. at, 102 S.Ct. 835, 842.

The same federalism principle dictates that when "the state" acts in its sovereign capacity, it is immune from antitrust liability. *Id.*, at 840, 841; *Bates v. State Bar of Arizona*, *supra*, 433 U.S. at 360; *Parker v. Brown*, *supra*, 317 U.S. at 350-351. But what organs of state government are "the state" for this purpose?

This Court's prior decisions do not answer that question. A state's legislature, governor and supreme court presumably are "the state" and are immune without meeting the *Midcal* test.⁶ This Court has never ruled whether some or all subordinate state agencies or officials with state-wide jurisdiction are likewise immune without meeting the *Midcal* test. This Court's decisions give no guidance in deciding at what level, if any, state agencies are no longer "the state" acting in its sovereign capacity.

⁶As Professor Areeda has written:

If the Court does decide to examine the acts of state organs under *Lafayette*, some exclusions are inescapable. The legislature itself (including, of course, the governor as part of the enactment process) is "the state." Similarly, the state's highest court is, in its realm, "the state" and requires no further authorization. In *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977)], the Supreme Court found [state action] immunity for lawyers' advertising rules promulgated by Arizona's highest court: "That court is the ultimate body wielding the State's power over the practice of law"

Fns. omitted; Areeda, *supra*, 95 Harv.L.Rev. at 444.

In this case, the court of appeals ruled that the *Midcal* test must be applied whatever the status of the state body. 686 F.2d at 697. That view is plainly wrong, as this Court's decisions in *Community Communications*, *Bates* and *Parker* show.⁷

This case involves a state entity but one step below the state's highest judicial authority. The Arizona Supreme Court appoints the members of its Committee on Examinations and Admissions. Ariz.Sup.Ct.R. 28(a). The Arizona Supreme Court's rules direct the committee to examine bar applicants and to recommend qualified applicants to the court for admission. *Ibid.* The committee is even required to report to the court on its formula for grading the bar examination. Ariz.Sup.Ct.R. 28(c)(VII)(B).

The Committee on Examinations and Admissions is as closely affiliated with and supervised by the Arizona Supreme Court as it is possible to be. The committee performs functions which the supreme court would otherwise have to perform itself, thereby reducing the time it has to de-

⁷See also, *State of New Mexico v. American Petrofina, Inc.*, 501 F.2d 363, 369-370 (9th Cir. 1974):

The "legislative mandate" test is useful, indeed possibly necessary, when there is doubt if the defendant or the regulatory scheme is really an instrument of the state. But when there is no doubt that the defendant is the state, the "legislative mandate" analysis is unnecessary.

Accord: *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52, 55-56 (1st Cir. 1966) and cases cited in the petition at pp. 12-13.

In *Deak-Perera Hawaii, Inc. v. Department of Transportation*, 553 F.Supp. 976, 989-981, 985, 988-989 (D.Hawaii 1983), Judge Pence has perceptively demonstrated the impropriety and futility of applying the *Midcal* test to instrumentalities of the state: "Where private parties are attempting to monopolize an area of trade, the public has every right to expect protection; with governmental bodies, the people have more direct recourse—the vote." *Id.* at 980-981.

cide cases. The Arizona Committee on Examinations and Admissions is "the state" and should not be required to pass the *Midcal* test to secure antitrust immunity.

The Court should grant certiorari to decide which subordinate state agencies with statewide jurisdiction are "the state" for antitrust purposes. The states need to know how far their antitrust immunity extends. See cases cited in Areeda, *supra* n. 2, 95 Harv.L.Rev. at pp. 445-452.

b. The State May Delegate Authority to Its Administrative Agencies Without Subjecting Them to Antitrust Scrutiny

Assuming *arguendo* that the Committee on Examinations and Admissions is not "the state," this case presents a second question of equal importance in the application of the *Midcal* test: How detailed must "the state's" directive to its own subordinate agency be in order to meet the "clearly articulated and affirmatively expressed as state policy" prong of that test?

Here, the court of appeals held that the Arizona Supreme Court's delegation to the committee of "general authority to examine applicants to determine if they are qualified to practice law and [the supreme court's review of] the Committee's recommendations regarding admission does not alone clothe the Committee's unilateral grading policies with blanket immunity from the antitrust laws." 686 F.2d at 696. The court of appeals appears to have held that a supreme court rule "directly requiring the challenged grading procedure" is necessary to meet *Midcal's* first prong. *Ibid.*

This holding, too, is plainly wrong. "Immunity for decisions of subordinate agencies or officials cannot depend on an explicit command from the legislature; delegation of governmental powers necessarily includes the discretion to make decisions not compelled by the legislature" or the supreme court. Areeda, *supra* n.2, 95 Harv.L.Rev. at 445

n. 49. State government could not function if the state legislature, governor or supreme court had to promulgate a law, executive order or rule "directly requiring" each decision, practice or procedure adopted by each of the thousands of boards, commissions and agencies through which each state carries on its business.

In a very recent case involving municipalities, entities less directly a part of state government, the Seventh Circuit held, in direct conflict with the decision below:

First, the Towns contend that the conduct which must be pursuant to state policy is the City's use of monopoly power in sewage treatment services to monopolize sewage collection and transportation

We reject the Towns' argument that the authorization of the anticompetitive conduct complained of must be as specific as they request. In *City of Lafayette*, the Court rejected the position "that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it may properly assert a *Parker* defense to an antitrust suit," and the Court went on to state that an adequate state mandate exists when it is found "from the authority given a city to operate in a particular area that the legislature contemplated the kind of action complained of". [Citation.] In this case, if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can assume that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization

Fn. omitted; *Town of Hallie v. City of Eau Claire*, No. 82-1715, slip op. at 7-8 (7th Cir. Feb. 17, 1983).

To properly conduct their affairs, states must know how much discretion they can allow their subordinate agencies

without rendering those agencies' acts subject to federal review in antitrust actions. The Court should take this opportunity to settle the conflict between the Seventh and Ninth Circuits and elucidate this aspect of the *Midcal* test.

c. A State Need Not "Actively Supervise" Its Own Agencies

Assuming the *Midcal* test applies to subordinate state agencies like the Arizona Supreme Court's Committee on Examinations and Admissions, the petition presents a third important question regarding state action immunity: Must the state "actively supervise" its subordinate agencies to shield their acts from antitrust review?

In the decision below, the Ninth Circuit concluded that the committee was not immune from the antitrust laws unless its grading practices were actively supervised by the Arizona Supreme Court. 686 F.2d at 696-697. In a very recent opinion, the Seventh Circuit has adopted a diametrically opposed view, holding that "a state is not held to the high standard of active supervision of the conduct of a city [or, *a fortiori*, a state agency such as the committee] performing a traditional municipal [or state] function for that [entity] to receive *Parker v. Brown* immunity. The only requirement for receiving immunity when a traditionally municipal function is involved is that the challenged restraint must be in furtherance or implementation of a clearly articulated and affirmatively expressed state policy." *Town of Hallie v. City of Eau Claire, supra*, slip op. at 16; see also *Deak-Perera Hawaii, Inc. v. Department of Transportation, supra*, 553 F.Supp. at 988-989.

This Court should grant certiorari to resolve the conflict between the circuits on this important question.

3. The Noerr-Pennington Doctrine Immunizes State Advisory Boards

The petition for certiorari also raises an important question concerning the application of the so-called *Noerr-Pennington* doctrine to state advisory boards.

Under this Court's cases, "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); see also, *Eastern R.R. President Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Where, as here, no "sham" activity has been alleged, see *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511-513 (1972), the actions of a purely advisory state body should be absolutely shielded from antitrust scrutiny by this doctrine.⁸

A determination of this question is of considerable nationwide importance. There are untold numbers of advisory boards at every level of American government. In 1972, Congress concluded that there were between 2,600 and 3,200 advisory committees in the federal government alone. H.R. Rep. No. 1017, 94th Cong., 2d Sess. (1972), reprinted in 1972 U.S. Code Cong. & Ad. News 3491, 3492.

Typically, such advisory boards include members of affected industries because they are knowledgeable about the matters on which the government seeks advice, they have an interest in participating, and their participation

⁸As the petition (pp. 19-20) demonstrates, the Arizona Committee on Examinations and Admissions is purely advisory. Arizona Supreme Court Rule 28(a) limits the committee's function to examining applicants and recommending to the supreme court for admission those applicants the committee finds qualified. The same rule provides that the supreme court will consider the committee's recommendations and then decide for itself whether to grant or deny admission.

assures that the government will hear a full range of views. See *id.* at 3495-3496. Because of this involvement by affected industries, it is easy for a displeased competitor to allege an anti-competitive conspiracy among advisory board members, as Ronwin did in this case.

But review of an advisory board's work under the anti-trust laws, or worse, imposition of liability on board members for acts taken by public officials following board recommendations, would severely restrict all levels of government in using this helpful means of acquiring expert assistance and community involvement in the solution of important social problems.

This Court should grant the petition for certiorari to hold that antitrust liability cannot be imposed on members of a state advisory board for performing their advisory function, absent allegation and proof of "sham" activity.

CONCLUSION

For the reasons stated above, the petition for certiorari raises important questions concerning the application of the federal antitrust laws to bar examiners in all states. The answers to the "state action" and "*Noerr-Pennington*" questions the petition presents will affect the fundamental allocation of power and responsibility between the state and federal governments.

This petition for certiorari presents an important opportunity for this Court to remove the threat of federal antitrust review of state administrative determinations.

The petition for certiorari should be granted, and the decision of the United States Court of Appeals for the Ninth Circuit should be reversed. Alternatively, the judgment should be summarily vacated and remanded for reconsideration in light of *District of Columbia Court of Appeals v. Feldman*, *supra*.

Dated: March 30, 1983

Respectfully submitted,

KURT W. MELCHIOR

One Embarcadero Center,
25th Floor

San Francisco, CA 94111
(415) 398-3344

*Attorney for Amicus Curiae
National Conference of
Bar Examiners*

Of Counsel:

ALLAN ASHMAN

333 North Michigan Avenue
Suite 1025
Chicago, IL 60601

JOHN F. O'HARA

PARKER, MILLIKEN, CLARK
& O'HARA

333 S. Hope Street,
27th Floor
Los Angeles, CA 90071

JAN T. CHILTON

SEVERSON, WERSON, BERKE
& MELCHIOR

A Professional Corporation
One Embarcadero Center,
25th Floor
San Francisco, CA 94111

No. 82-1474

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**IN THE SUPREME COURT OF
UNITED STATES**

**ALEXANDER L. STEVAS.
CLERK**

OCTOBER TERM, 1983

**CHARLES R. HOOVER, HOWARD H. KARMAN
ROBERT D. MYERS and HAROLD J. WOLFINGER
Petitioners,
vs.
EDWARD RONWIN,
Respondent.**

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE PETITIONERS

**CHARLES R. HOOVER
111 West Monroe
Phoenix, Arizona 85003
(602)262-5911
Petitioner in Propria
Persona, and Counsel for
the Remaining Petitioners**

**JEFFERSON L. LANKFORD
DONN G. KESSLER
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
(602) 262-5911
Of Counsel**

QUESTIONS PRESENTED FOR REVIEW

- I. IN GRADING BAR EXAMINATIONS, ARE MEMBERS OF THE ARIZONA SUPREME COURT'S COMMITTEE ON EXAMINATIONS AND ADMISSIONS ENGAGING IN "STATE ACTION" IMMUNE FROM FEDERAL ANTITRUST LIABILITY?

- II. IN PETITIONING THE ARIZONA SUPREME COURT TO ADMIT NEW MEMBERS TO THE BAR, ARE MEMBERS OF THE COURT'S COMMITTEE ON EXAMINATIONS AND ADMISSIONS IMMUNE FROM ANTITRUST LIABILITY UNDER THE "NOERR-PENNINGTON" DOCTRINE?

OTHER PARTIES BELOW^{1/}

^{1/}Additional parties to this case in the Court of Appeals were as follows: James L. Richmond and George Read Carlock and D. Thompson Slutes were members of the Committee on Examinations and Admissions and stand in the same position as petitioners. The State Bar of Arizona was named as a defendant, as were the wives of each of the individual defendants (Wanda Carlock, Judith Myers, Jane Doe Wolfinger, Jane Doe Richmond, Jane Doe Slutes, Jane Doe Karman, and Jane Doe Hoover). The Court of Appeals affirmed dismissal of the complaint as to the State Bar and each of the wives. Ronwin v. State Bar of Arizona, 686 F.2d 692, 694 n. 1 (9th Cir. 1982).

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No. 82-1474

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN,
ROBERT D. MYERS and HAROLD J. WOLFINGER
Petitioners,
vs.
EDWARD RONWIN,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals, as amended on rehearing, is published at 686 F.2d 692 and is reprinted as published in the Joint Appendix. (J.A. 96). The Court of Appeals' original decision, entirely superseded by the amendment on rehearing, is published at 1981-2

Trade Cas. (CCH) ¶ 64,414 and is reprinted in the Joint Appendix. (J.A. 29). The order and judgment of the United States District Court for the District of Arizona is unpublished and is reprinted in the Joint Appendix. (J.A. 23).

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its original judgment on December 14, 1981. (J.A. 29). A timely petition for rehearing and suggestion of appropriateness of rehearing en banc was filed, and rehearing was granted on July 29, 1982.

A new judgment of the Court of Appeals was entered on September 8, 1982. (J.A. 96). A timely petition for rehearing and suggestion of appropriateness of rehearing en banc

was filed with respect to the new judgment. This petition was denied on December 2, 1982. (J.A. 172).

The petition for certiorari was filed within 90 days after December 2, 1982. The Order granting the petition was entered on May 16, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY
PROVISIONS AND RULES INVOLVED

United States Code, Title 15, Section
1 - Trusts, Etc., In Restraint of
Trade Illegal...

Every contract, combination
in the form of trust or otherwise, or
conspiracy, in restraint of trade or
commerce among the several States, or
with foreign nations, is declared to
be illegal....

Constitution of the State of Arizona,
Arts. III & VI, § 1

Art. III - Distribution of
Powers. The powers of the government
of the State of Arizona shall be
divided into three separate
departments, the Legislative, the
Executive, and the Judicial; and,
except as provided in this

Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

Art. VI, § 1. ...The judicial power ... shall be vested in an integrated judicial department consisting of a supreme court, such intermediate appellate courts as may be provided by law, a superior court, such courts inferior to the superior court as may be provided by law, and justice courts.

Arizona Revised Statutes

§32-261A. ...No person shall practice law in this state unless he is an active member of the state bar in good standing as defined in this chapter.

§32-213A. ...All persons admitted to practice in accordance with the provisions of this chapter shall, by that fact, become active members of the state bar.

§32-275. ...This chapter [regulating attorneys] shall not be construed to limit the supreme court's common law jurisdiction with respect to admitting and disciplining members of the bar of the supreme court.

Rules of the Arizona Supreme Court^{1/}

Rule 28(a) - Examination and Admission. The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such

^{1/}The Rules are quoted as they read in February 1974.

purpose, a committee on examinations and admissions consisting of five active members of the state bar shall be appointed by this court....The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this court respecting examinations and admissions....The court will then consider the recommendations and either grant or deny admission.

Rule 28(c) I. No person shall practice law in the State of Arizona without being admitted to the Bar by compliance with the following rules...

Rule 28(c) II. ...[A]ny person desiring to be admitted to the practice of law in the State of Arizona must file with the Secretary of the Committee on Examinations and Admissions ... a written application in substantially the following form:

Application for Examination...

Rule 28(c) IV. The committee shall consider and act upon the application within six months after it is filed, unless the time therefor is extended by an order of the Supreme Court. The mere filing of an application does not entitle the applicant to be examined by the Committee. No applicant will be examined until his application has been considered and acted upon and permission granted by the Committee to

take such examination. No such permission will be granted until it is established to the satisfaction of the Committee: ...

4. That he is mentally and physically able to engage in active and continuous practice of law; ...

Rule 28(c) VII A ...The Committee may utilize the Multi-State Bar Examination ... and may utilize such grading or scoring system as the Committee deems appropriate in its discretion.

Rule 28(c) VII B The Committee ... will file with the Supreme Court thirty (30) days before each examination the formula upon which the Multi-State ... results will be applied with the other portions of the total examination results. In

addition, the Committee will file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination.

Rule 28(c) VIII A ...All applicants who receive a passing grade in the general examination ... and who are found to be otherwise qualified under these Rules shall be recommended for admission to the Bar.

Rule 28(c) XII ...

REVIEW BY THE SUPREME COURT

An applicant aggrieved by any decision of the Committee....

(C) For any substantial cause other than with respect to a claimed failure to award a satisfactory grade upon an examination;

may within 20 days after such occurrence file a verified petition with this Court for a review. The petition shall succinctly and briefly state the facts which form the basis for the complaint and applicant's reasons for believing this Court should review the decision of the Committee.... [T]his Court shall consider the papers so filed together with the petition and response and make such order, hold such hearings and give such directions as it may in its discretion deem best adapted to a prompt and fair decision as to the rights and obligations of applicant judged in the light of the Committee's and this Court's obligation to the public to see that only qualified applicants are admitted to practice as attorneys at law. ... An applicant

aggrieved by the failure of the Committee to award said applicant a satisfactory grade upon an examination may ... file a petition with the Committee.... Upon receipt of such application the Committee ... shall informally review the same and make such review of the applicant's examination papers as the Committee believes to be necessary.... If two members of the Committee shall so dissent in writing from [a] majority decision [finding the grade to be fair], the applicant may file a petition with this Court for review of the entire examination ... and this Court shall in its discretion either grant or refuse such review.

STATEMENT OF THE CASE

Edward Ronwin ("Ronwin") filed a complaint in the United States District Court for the District of Arizona against petitioners in 1978. He alleged that petitioners "were all members of the Committee on Examinations and Admissions of the Supreme Court of Arizona; and, as such, presided over and conducted the process by which applicants for membership in said Bar were examined ..."
(Complaint, J.A. 7-8, ¶ II).

(Petitioners are referred to as "the Examiners" in this brief.)

Ronwin alleged that in conducting and grading the examination administered in 1974, the Examiners violated the Sherman Act "by artificially reducing the numbers of

competing attorneys in the State of Arizona...." (Complaint, J.A. 10-11, ¶ VII.) Ronwin asserted that consequently, he did not receive a passing grade on the examination, ^{was} denied entry to the Arizona bar, and was damaged in the amount of \$400,000. (Complaint, J.A. 11-12, ¶¶ VII, IX.)

The Supreme Court's Examiners allegedly restricted admission by giving each applicant's examination paper a "raw score." Once these "raw scores" were known, the Examiners allegedly selected a particular "raw score" as the passing grade. According to Ronwin, the number of applicants who passed thus depended on the "raw score" chosen as a passing grade "rather than [on the] achievement by each Bar applicant of a

pre-set standard." (Complaint, J.A. 10, ¶ VI.)

Ronwin petitioned the Arizona Supreme Court to review his examination alleging, inter alia, violations of the federal antitrust laws. In an unreported decision, In re Petition of Ronwin, SB 52, the Arizona Supreme Court denied Ronwin's petition in an unreported decision and this Court denied his petition for a writ of certiorari. Ronwin v. Committee on Examinations and Admissions of the Supreme Court of Arizona, 419 U.S. 967 (1974). (J.A. 99).^{1/} Respondent then filed this action.

^{1/}The Committee on Examinations subsequently denied Ronwin's application to take the examination for a second time on the ground that respondent was mentally unable to engage in the practice of law. The (continued on next page)

The law considered by the courts below showed that Arizona has a clearly articulated affirmative policy restricting competition in legal services. Pursuant to those statutes and Arizona Supreme Court rules, no one may practice law unless he or she passes a bar examination. The Arizona Supreme Court, by its rules, mandates that its Committee on Examinations and Admissions shall devise a bar examination and select a grading system in the "Committee's discretion." The Committee then

(continued from previous page)
Committee's action, taken pursuant to Rule 28(c), was approved by the Arizona Supreme Court, and this Court again denied Ronwin's petition for certiorari. Application of Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976), cert. denied sub nom., Ronwin v. Special Committee on Examinations and Admissions of the Arizona Supreme Court, 430 U.S. 907 (1977) and Ronwin v. Supreme Court of Arizona, 439 U.S. 828 (1978) (two cases). (J.A. 99-100).

recommends admission to the Court and the Arizona Supreme Court orders or denies admission. Anyone aggrieved by the actions of the Committee can seek review from the Court. The text of these requirements are found at pages 5-12, supra.

Based on the above law, the district court dismissed Ronwin's complaint for failure to state a claim on which relief could be granted. (J.A. 23). The Court of Appeals for the Ninth Circuit reversed as to the Supreme Court's Examiners, but affirmed the dismissal of their wives and the Arizona State Bar. Two members of the panel of the Court of Appeals strictly applied the test of California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) and held that

petitioners were not entitled to "state action" immunity from antitrust liability.^{1/} Judge Ferguson dissented on the ground that the Examiners were state officials acting in their official capacity as the Supreme Court's Examiners and therefore were immune from antitrust liability. (J.A. 136-171).

^{1/}The original opinion of the panel majority was published at 1981-2 CCH Trade Cas. ¶ 64,414. The Examiners' motion for rehearing was granted, the original opinion was withdrawn, and a new opinion, published at 686 F.2d 692, was issued. (J.A. 96). The amended opinion inter alia expressly recognizes that the Examiners were members of a committee of the Arizona Supreme Court, not of the Arizona State Bar. (J.A. 98). The later opinion nonetheless adheres to the thesis that the Examiners, as state officials, were not entitled to state action immunity under the Midcal test.

SUMMARY OF ARGUMENT

This case is only the third case to be addressed by this Court where the regulatory acts by state officials, as opposed to private conduct subject to regulation, are challenged under the federal antitrust laws. The facts presented in this case differ little from those of Parker v. Brown, 317 U.S. 341 (1943) and New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978). Pursuant to the clearly articulated affirmative policy of the Arizona Supreme Court to supplant competition in legal services with regulation, the Arizona Supreme Court's Committee on Examinations and Admissions devised and graded bar examinations. The Arizona Supreme

Court, acting in its sovereign capacity, had instructed its Committee to select a grading or scoring system which the Committee deemed "appropriate in its discretion." The grading of the examinations of which Ronwin complains was thus contemplated by Arizona's articulated policies.

In reversing the dismissal of the respondent's complaint, the Court of Appeals erroneously applied to state officials the "state action" test applicable to private conduct as summarized in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., supra. The Court of Appeals' decision was erroneous for three reasons.

First, this Court has never held that the strict Midcal test is

applicable to the conduct of state officials. Rather, this Court has consistently held that when purely state conduct is at issue, the test for state action immunity is whether the State has clearly articulated an affirmative policy designed to supplement competition with regulation and whether the state policy contemplated the challenged conduct. Furthermore, the principles of federalism underlying "state action" immunity do not permit antitrust liability to attach to state officials for enforcing a clear state regulatory scheme. When the State's own officials are engaged in the challenged conduct pursuant to state policy, there is no danger that private misconduct will be immunized

by a "gauzy cloak" of mere state approval. Both federalism and economic competition are preserved when state officials are immunized for acting pursuant to state policy. The regulatory policy of the Arizona Supreme Court and the conduct of its Committee on Examinations and Admissions meet that test.

Second, even if the Midcal test were applicable to the Examiners' conduct, that test was met here. The Arizona Supreme Court ordered its Committee to develop a test and examine applicants. It further instructed its Committee to develop a grading system in its discretion. The State of Arizona thus articulated a detailed and specific policy. It then actively supervised the implementation

of its policy as the rules of the Arizona Supreme Court provide for a review by that Court of a petition by an unsuccessful bar applicant.

Arizona Supreme Court Rule 28(c). In fact, Ronwin utilized that procedure.

In re Petition of Ronwin, supra;

Application of Ronwin, supra. The

Arizona Supreme Court has reviewed bar admission and discipline matters in many other cases, and indeed reserves the final decision on such matters to itself. This active state supervision is no different than the supervision this Court found "significant" in Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

Finally, the Examiners' are immunized because their duties were to develop and grade an examination,

review an applicant's qualifications, and to recommend admission to the Arizona Supreme Court. Only the Arizona Supreme Court could order or deny admission. Such conduct is immunized by the Noerr-Pennington doctrine. Ronwin's complaint failed to allege (and could not allege) any conduct taking the duties and actions of the Examiners out of that exemption.

The Court of Appeals erred in reversing the dismissal of Ronwin's complaint. As the Examiners' alleged conduct met any and all tests for "state action" immunity and fell squarely within the protection of Noerr-Pennington, the Court of Appeals should be reversed and the district court's order reinstated.

ARGUMENT

I. IN GRADING BAR
EXAMINATIONS, OFFICIALS OF THE ARIZONA
SUPREME COURT ARE ENGAGED IN "STATE
ACTION" IMMUNE FROM ANTITRUST
LIABILITY.

A. As official action by the
State, grading bar examinations is
immune from antitrust liability.

In Parker v. Brown, supra,
this Court held that the Sherman Act
did not apply to a state program to
restrict competition and restrain
prices in the raisin market. There
could be no antitrust action against
the state officials who administered
the program because the State, "as
sovereign, imposed the restraint as an
act of government which the Sherman
Act did not undertake to prohibit."
317 U.S. at 352.

Parker v. Brown established that the Sherman Act is inapplicable to state action. The question presented in this case is whether the Arizona Supreme Court's Examiners, in grading bar exams pursuant to Arizona Supreme Court rules, were engaged in "state action" immune from federal antitrust liability.

While the scope of state action immunity for private persons and municipalities has been a recurrent question since Parker v. Brown,^{1/} this case presents a simple

^{1/}E.g., Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Midcal, supra; Goldfarb v. Virginia State Bar, 421 U.S. 733 (1975); City of Lafayette, Louisiana v. Louisiana Power & Light Co., 435 U.S. 389 (1978) and Community Communications Co. v. City of Boulder, Colorado, 455 U.S. 40 (1982). While Bates v. State Bar of Arizona, supra, involved a state body, it addressed a prohibition of private conduct enforced by the State.

issue: whether state action immunity includes state officials acting in their official capacity. The Court of Appeals complicated this issue by testing the actions of the Arizona Supreme Court's Examiners as if they were private persons. The Court of Appeals thereby erred, for the test of state action is neither so complex nor so stringent for state officials as it is for private persons.

The Examiners argue that: (1) they are state officials; (2) the state action test for state officials is whether the State has clearly articulated an affirmative state policy to supplant competition with regulation; and (3) the Examiners meet the immunity test for state officials. The Examiners argue in the

alternative that they meet the stricter Midcal test even if they are considered to be private persons.

1. The Arizona Supreme Court's examiners are state officials.

Based upon the facts alleged in the complaint, the holding of the Court of Appeals, and relevant state law, the Supreme Court's Examiners are state officials.

The complaint alleges that petitioners "were all members of the Committee on Examinations and Admissions of the Supreme Court of Arizona; and, as such, presided over and conducted the process by which applicants for membership in said bar were examined . . ." (Complaint, J.A. 7-8, ¶2).

The Court of Appeals expressly recognized that the

Examiners were appointed by the Arizona Supreme Court pursuant to Rule 28(a), Rules of the Arizona Supreme Court and that the Committee was not an arm of the State Bar.^{1/}

^{1/}686 F.2d at 697 (J.A. 98).
Rule 28(a) provided in pertinent part:

The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purpose, a committee on examinations and admissions consisting of five active members of the state bar shall be appointed by this court upon the recommendation of the board of governors of the state bar which shall recommend at least three members of the state bar for each appointment to be made... The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this court respecting examinations and admissions heretofore adopted and made
(continued on next page)

This part of the decision below is correct. The Court of Appeals had previously held that the Arizona Supreme Court's power to examine bar applicants had been delegated to the Committee. In Hackin v. Lockwood, 361 F.2d 499, 501 (9th Cir.), cert. denied 385 U.S. 960 (1966), the Court of Appeals held: "This [Committee on Examinations] is not a committee of the State Bar, but a committee named by the Supreme Court of Arizona, made up of members of the Arizona State Bar, Rule 28(a). Thus

(continued from previous page)
effective May 25, 1948, and as amended effective February 1, 1954, and such other rules as hereafter adopted. The court will then consider the recommendations and either grant or deny admission. (emphasis added).

The Court of Appeals thereby corrected its omission of this point in its earlier, superseded opinion, published at 1981-2 CCH Trade Cas. ¶ 64,414.

... the power to grant or deny admission is vested solely in the Arizona Supreme Court."

In addition, Articles III and VI, § 1 of the Arizona Constitution as well as Arizona Revised Statutes ("A.R.S.") § 32-275^{1/} confirm that

^{1/}Ariz. Const., art. III, provides, that "The powers of the ... State of Arizona shall be divided into three separate departments, the Legislative, the Executive and the Judicial..." Article VI, § 1, provides that "The judicial power ... shall be vested in an integrated judicial department consisting of a supreme court, such intermediate appellate courts as may be provided by law, a superior court, such courts inferior to the superior court as may be provided by law, and justice courts." A.R.S. § 32-275 provides that "This chapter [regulating attorneys] shall not be construed to limit the supreme court's common law jurisdiction with respect to admitting and disciplining members of the bar of the supreme court." The Arizona Supreme Court has recognized its inherent power to allow or deny admission to the bar. Application of Courtney, 83 Ariz. 231, 319 P.2d 991 (1958).

this Court was correct in previously holding that the Arizona Supreme Court "is the ultimate body wielding the State's power over the practice of law" and its acts exercising this power are those "of the State acting as a sovereign". Bates v. State Bar of Arizona, supra.

Contrary to the assertion of the court below, (J.A. 103), the Examiners do not assert that the fact that they are state officials is alone dispositive of the state action question. That the conduct attacked as an antitrust violation is a state agency's or official's does affect the test for state action, however, as discussed in the next section of the Argument.

2. The state action test for state officials is whether the State has clearly articulated an affirmative state policy designed to supplant competition with regulation.

The Court of Appeals applied the Midcal test to determine whether the Supreme Court's Examiners were engaged in state action. (J.A. 106-107). The Midcal test requires that the challenged conduct be compelled by a clearly articulated state policy and be actively supervised by the State.

This Court has never held, however, that the Midcal test applies to state officials. Rather, this Court has consistently held that when governmental conduct is at issue, the test for state action immunity is whether the State has clearly

articulated an affirmative policy designed to supplant competition with regulation, and whether the policy contemplated the challenged action. New Motor Vehicle Board v. Orrin W. Fox, Co., supra; City of Lafayette, supra. Subjecting the Examiners to the more stringent test applicable to private persons undermines the principle of federalism underlying the state action doctrine. The test adopted by the court below ignores this Court's consistent statements that for state action purposes, the conduct of state officials is different from the conduct of private persons.

This Court's prior decisions and the federalism interests which they protect call for a different test

for official state conduct than that applied to private persons. State officials are immune from antitrust liability when: (1) they act pursuant to a clearly articulated state policy to replace competition with regulation and (2) the challenged actions are of the type contemplated by the state policy.^{1/}

State action immunity for the acts of state officials was distinguished from purely private

^{1/}The Arizona Constitution provides that "the powers of the State of Arizona shall be divided into three departments, the Legislative, the Executive and the Judicial." Ariz. Const. art. III. It allocates to the Legislature, the Governor, and the Supreme Court the ultimate power of each branch. Ariz. Const. art. IV, § 1, art V, §4, and art. VI, §1. In this case, the policy was articulated by one of the repositories of ultimate state power, the Arizona Supreme Court. Bates, supra.

conduct in the first case to consider the matter. In Parker v. Brown, California had developed a raisin marketing program. The program was initiated by producers, but had to be approved by a state commission. Thus, the Commission's acts, not private conduct, restricted competition. This Court held that California's regulatory program was pursuant to "legislative authority" and as such was an act of the "state itself." 317 U.S. at 352. Since the Sherman Act was a "prohibition of individual [restraint] and not state action," the Act "did not undertake to prohibit" the program even though it had anti-competitive effects. 371 U.S. at 352. Under such circumstances, the federal courts defer to the State's regulation.

Parker itself was premised upon the proposition that the Sherman Act "was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government." Goldfarb v. Virginia State Bar, 421 U.S. at 788.

Understandably, different standards govern private conduct than acts by state officials to ensure that the Act is applied as intended to the one but not the other.

The instant case is illuminated most by New Motor Vehicle Board v. Orrin W. Fox Co., supra.

State statutes permitted local automobile dealers to protest the establishment of new car dealerships. A hearing was then held before a state board which could preclude new dealers

from entering the market. This Court found such conduct immune as "state action" because the State had clearly articulated a policy to supplant competition with regulation. Justice Brennan noted for the majority:

The dispositive answer is that the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the "state action" exemption. Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943); Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 2d 810 (1977). See also City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978).

439 U.S. at 109.

The Court also held that for state agencies, as for cities, the

policy need not be detailed or compelling.^{1/} (Citing Lafayette, supra.) Rather, as stated in Lafayette, 435 U.S. at 415,

This does not mean, however, that a political subdivision must be able to point to a specific detailed legislative authority ... while a subordinate governmental unit's claim to Parker immunity is not as readily established as the same claim by a state government sued as such ... an adequate state mandate for anti-competitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." [citations and footnote omitted]

This Court has pointedly differentiated immunity for the acts

^{1/}The Court did not need to address whether active state supervision was required to immunize the board's actions. As here, the board's actions were that of the State itself and supervision would have been superfluous. This point is discussed infra.

of state agencies from immunity for the acts of others. For example, Bates v. State Bar of Arizona, supra, distinguished Cantor v. Detroit Edison Co., supra, as involving a private defendant, an electric utility:

[T]he context in which Cantor arose is critical. . . .
[O]bviously, Cantor would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party. Here, the appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. . . . Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision.

433 U.S. at 361 (footnote omitted).

The duality of the state action doctrine was recently confirmed

by this Court in Community Communications Co., Inc. v. City of Boulder, Colorado, supra. The Court there observed that conduct is immune if it is either action of the State itself or if a sufficient connection is demonstrated between the challenged conduct and state authority:

Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see Parker, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. See City of Lafayette, Orrin W. Fox Co., and Midcal.

455 U.S. at 52 (emphasis added).

The distinction has been applied specifically to regulation of the bar. The Courts of Appeals have approved state action immunity for bar regulators without the degree of

scrutiny applied to private persons.
E.g., Princeton Community Phone Book,
Inc. v. Bate, 582 F.2d 706 (3d Cir.),
cert. denied 439 U.S. 966 (1978);
Foley v. Alabama State Bar, 648 F.2d
355 (5th Cir. 1981); see also Feldman
v. Gardner, 661 F.2d 1295 (D.C. Cir.
1981), cert. denied sub nom., Feldman
v. District of Columbia Court of
Appeals, ____ U.S. ____, 102 S.Ct.
3483 (1982), vacated on other grounds
sub nom., District of Columbia Court
of Appeals v. Feldman, ____ U.S. ____,
103 S.Ct. 1303 (1983) (two cases)
(regulation by District of Columbia
Court of Appeals).

States can act only through
their officers and agencies. State
action immunity would mean little if
it protected only the State of Arizona
and not its officials. This Court

recognized that fact in Parker, observing that the Sherman Act was not intended "to restrain a state or its officers or agents from activities directed by its legislature" and noting that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." Parker v. Brown, 317 U.S. at 350-351 (emphasis added).

The federalism notions which underlie Parker v. Brown support more generous antitrust immunity for state officials than for private persons. Parker was concerned with preserving our "dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority..." Parker, 317

U.S. at 351. This Court recently reaffirmed that "immunity for state regulatory programs is grounded in our federal structure." Midcal, 445 U.S. at 103.^{10/}

^{10/}The concern for federalism is intensified when the challenged state action is the traditional and fundamental role of the States in regulating the bar. "[T]he States have a compelling interest in the practice of professions . . . [and] they have broad power to establish standards for licensing practitioners and regulating the practice of professions. . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" Goldfarb, 421 U.S. at 792. "[T]he regulation of the activities of the bar is at the core of the State's power to protect the public." Bates, 433 U.S. at 361. This Court recognized that this makes a difference in state action analysis: "Federal interference with a State's traditional regulation of a profession is entirely unlike the intrusion the Court sanctioned in Cantor." Bates, 433 U.S. at 362 (footnote omitted). Whether regulation of the bar, as an (continued on next page)

The cases decided since Parker have focused on whether private anti-competitive conduct was compelled by a state regulatory scheme. Private parties are immune when subjecting them to pro-competitive federal antitrust law would jeopardize the State's regulatory effort by discouraging compliance with inconsistent state regulations.

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"integral" and "traditional" State function, City of Lafayette, 435 U.S. at 423-424 (Burger, C.J., concurring), is immunized from antitrust liability by the Tenth or Eleventh Amendments need not be reached. Because state action immunity supported by general notions of federalism is available, the potentially substantial and difficult issue of whether antitrust liability violates specific constitutional guarantees to the States need not be decided. See Goldfarb, 421 U.S. at 792, n. 22 (Eleventh Amendment issue not reached, but left open on remand). See generally National League of Cities v. Usery, 426 U.S. 833 (1976).

Sherman Act liability for regulated private conduct indirectly undermines State power by undercutting the effects of its actions. Liability for the regulatory acts of State officials, on the other hand, directly impairs the acts of a sovereign and thereby injures its capacity to govern. Thus, immunity for state officials is more important to our federal system than immunity for private, though regulated, enterprises.

The reasons for a more stringent state action test for private persons are also absent from cases involving official conduct pursuant to a clearly articulated state policy. Midcal's stricter requirements, while preserving state action immunity, are designed to

prevent private parties from acquiring immunity for their anti-competitive actions under "a gauzy cloak of state involvement." Midcal, 445 U.S. at 106. Midcal is thus an accommodation of the potentially conflicting interests in preserving federalism and promoting antitrust policy.

Without meaningful state involvement in the challenged conduct, antitrust immunity for private persons is unnecessary for there is little fear in such a case that antitrust liability would infringe upon the power or acts of the State. When conduct by private persons is challenged, the courts rightly demand some assurance that state action immunity will promote federalism and not merely shield private misdeeds.

That assurance is substantial state involvement in the challenged conduct, and Midcal specifies the degree of involvement required.

The need for an assurance of intimate state involvement is superfluous, however, if the anti-competitive acts are the regulatory efforts of a State agency or official and not a private person. In that case, private misconduct is not shielded because the only anti-competitive conduct being immunized is the State's own regulatory acts. And, since the policy authorizing the conduct has been expressed by "the State itself" through the Legislature, Governor or Supreme Court, the courts are assured that antitrust policies are not being sacrificed for doubtful reasons.

Applying Midcal to state officials acting pursuant to state policy is also unnecessary, illogical and unwise. It is unnecessary because a state agency or official acting pursuant to a clearly articulated state policy is restrained from anti-competitive misconduct by the existence of the state policy and authorization for the official to act. Federal antitrust review of state action is unnecessary because the States review their officials' actions for consistency with state law and policy. Areeda, "Antitrust Immunity for 'State Action' after Lafayette," 95 Harv. L. Rev. 435, 454 (1981). See, e.g., Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (affirming state court review

of statute authorizing restraints on competition); Llewellyn v. Crothers, 1983-1 CCH Trade Cas. ¶ 65,358, at 70,138 (D. Ore. 1983) (state supervision in its own regulatory review invalidated adjustment of medical payments).

Requiring state supervision of state conduct is also illogical and unwise. Who would supervise the state agency or official? Does an agency simply supervise itself? "To ask if the state controls and reviews the DOT [State Department of Transportation] is to simply ask if the state exercises control over and governs its own actions. The tautology is complete. The DOT, as an agent and instrumentality of the state, is controlled and reviewed constantly by

the state." Deak-Perera Hawaii, Inc.
v. Department of Transportation, 553
F.Supp. 976, 988-9 (D. Haw. 1983).

Alternatively, active supervision of a
state official or agency by the
"State" would require that the
ultimate repositories of state power
-- the state legislatures, governors,
and supreme courts -- constantly
monitor each decision and act of their
subordinates to ensure strict
compliance with state policy. This is
simply an impractical and unreasonable
expectation. Such a rule invites
rather than discourages antitrust
actions against the States.

If Midcal were strictly
applied to state agencies, the
antitrust laws would make any
delegation of state regulatory

functions to state agencies meaningless. If, for example, the Arizona Supreme Court had to compel and supervise specific grading procedures, it would have to decide such matters as whether 69 as opposed to 70 would be a passing grade; whether a grading "curve" could be permitted; how many persons would pass; what questions and answers should be; what examination time limits would be, and all other details of the examinations process.^{11/}

The Arizona Supreme Court, like every other state judiciary, has

^{11/} Indeed, Ronwin pointed to those aspects of the examination in his petition to the Arizona Supreme Court to review the 1974 examination.

delegated such examination duties to bar examiners while retaining ultimate authority over admissions. S. Duhl, The Bar Examiners' Handbook 15-16 (2d ed. 1980); F. Klein, S. Leleiko & J. Marity, Bar Admission Rules and Student Practice Rules 30-33 (1978). Antitrust liability would effectively prevent the courts from delegating these tasks. The courts would be overwhelmed by the work required to examine each applicant thoroughly. At worst, the Arizona Court's ability to screen bar applicants would be debilitated; at the very least, the critical capacity of the examination would suffer, depriving state courts of their best tool to assure lawyer competence at a time of widespread concern about the quality of

lawyering.^{11/}

It would also be anomalous to apply a stricter "state action" standard for state agencies than for cities and municipalities. Cities and other subordinate governmental units are immunized if they act pursuant to a clearly articulated affirmative state policy aimed at supplanting competition with regulation.

Community Communications Co. v. City of Boulder, supra; City of Lafayette, supra, (plurality opinion). There is

^{11/}E.g., Burger, "The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?", 42 Fordham L.Rev. 227 (1973); Maddi, "Trial Advocacy Competence: The Judicial Perspective", A.B.F. Research J. 105 (1978); Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts, reprinted at 83 F.R.D. 215 (1979).

no requirement that the State compel conduct for cities to act or that the state policy be detailed and specific. See City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 415 (plurality); Community Communications Co., Inc. v. City of Boulder, supra at 51; Town of Hallie v. City of Eau Clair, 700 F.2d 376 (7th Cir. 1983), petition for cert. filed, 51 U.S.L.W. 3842 (U.S. May 11, 1983) (No. 82-1832); Gold Cross Ambulance Serv., Inc. v. City of Kansas City, 1983-1 CCH Trade Cas. ¶ 65,339 at 70,017-70,019 (8th Cir. 1983); Hybud Equip. Corp. v. City of Akron, 455 U.S. 931 (1982), on remand 1983-1 CCH Trade Cas. ¶ 65,356, at 70,119 - 70,120 (N.D. Ohio 1983); Cent. Iowa Refuse Systems, Inc. v. Des Moines Met. Area Solid Waste Agency,

557 F. Supp. 131 (S.D. Iowa 1982). In addition, this Court has expressly reserved the question of whether the active supervision requirement should apply to cities. Community Communications Co. v. City of Boulder, 455 U.S. at 51-2, n. 14.^{11/}

In sum, considerations of federalism require a different test for state action by state officials and agencies. The States have an historic and important role in economic regulation, especially in regulating the professions. When the State has expressed its policy to regulate rather than allow unbridled

^{11/}A number of lower courts have held that such supervision is not required. Town of Hallie v. City of Eau Claire, *supra*; Gold Cross Ambulance Serv. v. City of Kansas City, *supra*, at 70,021-70,022; and Hybud Equip Corp. v. City of Akron, *supra* at 70,121-70,122.

competition, federal antitrust law should not restrict state officials acting under the authority of the State's policy. Instead, state action immunity permits the States to carry out their governmental tasks.

3. The Arizona Supreme Court's examiners meet the "state action" immunity test for state officials.

The Examiners' actions in grading Ronwin's bar examination easily meet the test for state action immunity. They acted as state officials under a clearly articulated state policy to supplant competition in legal services with regulation.

Arizona has a comprehensive system of regulation of the bar. The Arizona Supreme Court's Rule 28(c), at issue in this case, is only a part of that system. State law forbids the

practice of law by persons not admitted to the bar by the Arizona Supreme Court. A.R.S. §§ 32-261, 213 and Rule 28(c).^{14/} Pursuant to the Arizona Supreme Court's power to regulate bar admission,^{15/} it delegated the administration and grading of bar examinations to its Committee on

^{14/}The relevant portions read as follows:

"§32-261A. No person shall practice law in this State unless he is an active member of the state bar in good standing as defined in this chapter."

"§32-213A. All persons admitted to practice in accordance with the provisions of this chapter shall, by that fact, become active members of the state bar."

"Rule 28(c)I. No person shall practice law in the State of Arizona without being admitted to the Bar by compliance with the following rules. . . ."

^{15/}See Application of Courtney, supra (inherent power) and A.R.S. § 32-275 (statutory authorization).

Examinations and Admissions. Rule 28(a). The Arizona Supreme Court delegated some measure of discretion to its Examiners to grade the examinations. Arizona Supreme Court Rule 28(c), applicable to the exam in question read, in pertinent part:

VII.

A. ...The Committee may utilize the Multi-State Bar Examination...and may utilize such grading or scoring system as the Committee deems appropriate in its discretion.

B. The Committee...will file with the Supreme Court thirty (30) days before each examination the formula upon which the Multi-State Bar Examination results will be applied...In addition, the committee will file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination.

VIII.

A. ...All applicants who receive a passing grade in the general examination...shall be recommended for admission to the Bar... (emphasis added).

The regulatory scheme here is no different than that approved by the Court in Parker v. Brown. See also discussion of Bates v. State Bar of Arizona and Midcal, infra. In Parker, a committee of private persons formulated the program. The state commission then had to approve the program if it found "that 'the program is reasonably calculated to carry out the objectives of this act.'" 317 U.S. at 347. Here, the Examiners have similar discretion to develop the exact questions and the grading formula to be used. Rule 28(c). As did the California program involved in Parker, the Arizona statutes and Supreme Court rules establish a clearly articulated regulatory policy which contemplated the action taken by the Examiners. See also Euster v.

Eagle Downs Racing Ass'n, 677 F.2d 992 (3d Cir. 1982), cert. denied sub nom., Euster v. Pennsylvania Horse Racing Comm'n., ____ U.S. ____, 103 S.Ct. 388 (1982) (broad discretion given regulatory commission to exact rules and set fees satisfies "state action" test for state officials).

In sum, Arizona clearly articulated a policy supplanting competition with regulation. That policy contemplated the actions of which Ronwin complains. The Committee was authorized to grade the examination in its discretion. The existence of such policy is sufficient to render the members of the Arizona Supreme Court's Committee on Examinations and Admissions immune: grading the examinations was contemplated by

Arizona's clearly articulated affirmative policy to displace competition in legal services with regulation.

- B. As private conduct, grading bar examinations is immune because it meets the Midcal test.

Even if the Court should determine that the stricter version of the Midcal test for private persons should be applied to the state officials here, the Examiners are also immune from antitrust liability under that test.

Midcal requires that for immunity to exist, the conduct complained of must be compelled by a clearly articulated affirmative state policy and be actively supervised by

the State. Arizona clearly articulated an affirmative state policy concerning admission to the bar including a specific and affirmative policy on grading bar examinations. Arizona actively supervised the grading through both the Arizona Supreme Court and its Committee on Examinations and Admissions.

In this case, "the challenged restraint" was no less clearly expressed as Arizona's policy than in other cases applying the Midcal test to private conduct. The Arizona Supreme Court clearly articulated Arizona's policy to restrict competition in legal services by limiting admission to the bar. The Court ordered its Committee on Examinations and Admissions to develop and grade a bar examination to effect

this policy. Arizona Supreme Court

Rule 28.^{18/}

^{18/}The pertinent provisions of the Arizona Supreme Court's rules read as follows:

Rule 28(a): ... [A] committee on examinations and admissions ... shall be appointed by this court ... The committee shall examine applicants ...

Rule 28(c) I: No person shall practice law in the State of Arizona without being admitted to the Bar by compliance with the following rules...

Rule 28(c) IV: The committee shall consider and act upon the application within six months after it is filed, unless the time therefor is extended by an order of the Supreme Court. The mere filing of an application does not entitle the applicant to be examined by the Committee. No applicant will be examined until his application has been considered and acted upon and permission granted by the Committee to take such examination. No such permission will be granted until it is established to the satisfaction of the Committee: ...

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Arizona's policy of
regulating admissions to the bar by
administering examinations is no

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4. That he is mentally and
physically able to engage in
active and continuous practice of
law; ...

Rule 28(c) VII A: ...The
Committee may utilize the Multi-
State Bar Examination ... and may
utilize such grading or scoring
system as the Committee deems
appropriate in its discretion.

Rule 28(c) VII B: The Committee
... will file with the Supreme
Court thirty (30) days before each
examination the formula upon which
the Multi-State ... results will
be applied with the other portions
of the total examination results.
In addition, the Committee will
file with the Court thirty (30)
days before each examination the
proposed formula for grading the
entire examination.

Rule 28(c) VIII A: ...All
applicants who receive a passing
grade in the general examination
... and who are found to be
otherwise qualified under these
Rules shall be recommended for
admission to the Bar. (Emphasis
added)

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different than other state policies which have satisfied the Midcal "state action" test. In Midcal itself, the California statute in question provided that each private wine grower or wholesaler "...shall: (a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract... (b) Make and file a fair trade contract and file a

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Prior to January, 1974, when Rule 28(c) was amended, (Arizona Legislative Service 1974 at 93 (January 15, 1974)), Rule 28(c) VIII required a "grade of seventy or more in the general examination" to be recommended for admission to the bar. That requirement was deleted beginning with the February 1974 examination And Rule 28(c) VII allowing the Committee's discretion in grading was substituted. See the affidavit of the Clerk of the Arizona Supreme Court attached to the Examiners' Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc filed with the Court of Appeals in January 1982.

schedule of resale prices, if he owns or controls a brand of wine..." (emphasis added). 445 U.S. at 99, n. 1. In addition, no wine merchant was permitted to sell wine to a retailer at any other price other than as set by the resale price schedule or fair trade contract. Id. at 99. Finally, state regulations provided that the prices posted "by a single wholesaler within a trading area bind all wholesalers in that area." 445 U.S. at 100.

Justice Powell, speaking for a unanimous court,^{12/} wrote:

The California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance.

445 U.S. at 105.

^{12/}Justice Brennan did not participate, however.

Despite the fact that California did not set or require any particular prices but only permitted private persons to post rates, its regulatory scheme sufficiently expressed a state policy to permit resale price maintenance. Similarly, the Arizona Supreme Court did not set the precise grading procedure for bar examinations. It established a system which required examinations and ordered the Examiners to set the exact standard. Arizona's regulatory program clearly indicates that Arizona adopted a policy to limit competition in the practice of law to those who have passed an examination.

Bates v. State Bar of Arizona, supra, also demonstrates that Arizona's policy has been clearly enunciated. In Bates, the regulation provided that "A lawyer shall not

publicize himself, or his partner, or associate ... or his firm, as a lawyer through newspaper or magazine advertisements...." 433 U.S. at 355. The Court found that the regulation itself clearly revealed a state policy: "The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior..." 433 U.S. at 362.

The decision of the Court of Appeals in this case also conflicts with that a previous decision of that Court. In Benson v. Arizona State Board of Dental Examiners, 673 F.2d 272 (9th Cir. 1982), the court held that statutes conferring the power on a board to regulate the admission to the practice of dentistry including examinations, but which did not "lay down all the requirements" imposed by

the board, met the first part of the Midcal test. 673 F.2d at 275 and 276, n. 8.

The second part of the Midcal test -- active state supervision -- was also met in this case. Pursuant to Arizona Supreme Court Rule 28(c)XII, 11/'

11/'That rule provides two procedures. First,

[A]n applicant aggrieved by any decision of the Committee....

- (C) For any substantial cause other than with respect to a claimed failure to award a satisfactory grade upon an examination;

may within 20 days after such occurrence file a verified petition with this Court for a review. The petition shall succinctly and briefly state the facts which form the basis for the complaint and applicant's reasons for believing this Court should review the decision of the Committee.... [T]his Court shall consider the papers so filed together with the petition and response and make such order, Hold
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unsuccessful bar applicants may petition the Arizona Supreme Court to review the circumstances of the

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such hearings and give such directions as it may in its discretion deem best adapted to a prompt and fair decision as to the rights and obligations of applicant judged in the light of the Committee's and this Court's obligation to the public to see that only qualified applicants are admitted to practice as attorneys at law....

Second,

[a]n applicant aggrieved by the failure of the Committee to award said applicant a satisfactory grade upon an examination may ... file a petition with the Committee.... Upon receipt of such application the Committee ... shall informally review the same and make such review of the applicant's examination papers as the Committee believes to be necessary.... If two members of the Committee shall so dissent in writing from [a] majority decision [finding the grade to be fair], the applicant may file a petition with this Court for review of the entire examination ... and this Court shall in its discretion either grant or refuse such review.

examination and other action by the Committee. Indeed, Ronwin petitioned from this examination and the later finding that he was unable to practice law. At that time, he raised antitrust claims being resurrected in this action. In re Petition of Ronwin, supra; Application of Ronwin, supra.

The Arizona Supreme Court has actively pursued its "supervisory" role in bar matters. E.g., Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1964). Historically, the Court has not always accepted its Committee's recommendations. E.g., Application of Levine, supra; Application of Klahr, 102 Ariz. 529, 433 P.2d 977 (1967); Application of Guberman, 90 Ariz. 27, 363 P.2d 617 (1961); Application of Courtney, supra.

Arizona's supervision in this case is no less active than that referred to in Bates. There, this Court held that

[T]he rules are subject to pointed re-examination by the policymaker --the Arizona Supreme Court--in enforcement proceedings...we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.

433 U.S. at 362.

Thus, the Examiners are immune even if they are private persons subject to the Midcal test. They acted pursuant to a clear state policy to limit admission to the bar. Their actions are compelled by the Arizona Supreme Court and actively reviewed by the Arizona Supreme Court. The Examiners are thus immune from antitrust liability, and the

holding to the contrary by the Court of Appeals must be reversed.

II. IN PETITIONING THE ARIZONA SUPREME COURT TO ADMIT NEW MEMBERS TO THE BAR, PETITIONERS ARE IMMUNE FROM ANTITRUST LIABILITY UNDER THE "NOERR-PENNINGTON DOCTRINE.

In addition to the "state action" doctrine, a separate but related doctrine exempts the Examiners from antitrust liability. The Noerr-Pennington doctrine immunizes concerted efforts to obtain and influence government action. Such immunity protects the Examiners' petitions to the Arizona Supreme Court that it grant or deny admission to the bar.

In Eastern R.R. Presidents Conference v. Noerr Motor Freight,

Inc., 365 U.S. 127 (1961), a group of railroads combined in a publicity campaign to "foster the adoption and retention of laws and law enforcement practices destructive of the trucking business..." 365 U.S. at 129. This Court reversed the judgment for the plaintiffs on the basis that

[N]o violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws.... [T]he Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations..." Accordingly ... where a restraint upon trade ... is the result of valid governmental action ... no violation of the Act can be made out.

365 U.S. at 135-136 (emphasis added).

From that starting point, the Court held that combinations to persuade or influence governmental action which would produce a restraint or a monopoly were also not unlawful.

We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together ... to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

365 U.S. at 136.

As later summarized by this Court in California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the Court's ruling in Noerr meant that

[N]o cause of action was alleged insofar as it was predicated upon mere attempts to influence the Legislative Branch for the passage of laws or the Executive Branch for their enforcement.

404 U.S. at 510.^{12/}

^{12/}The two fundamental bases for this ruling were summarized in Motor Transport as follows:

(1) "In a representative democracy such as this, these branches of government act on behalf of the people and, to a
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In applying this immunity to the facts presented in Noerr, the Court found that all of the efforts by the defendants were directed at the passage of laws to injure the plaintiffs. The Court held that

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very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." [citations omitted]

(2) "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." [citations omitted]

defendants' conduct was immunized even though the defendants' intent was "to hurt the truckers in every way possible..." 365 U.S. at 142. As the Court held in Noerr, where there was no direct attempt to persuade persons not to deal with the plaintiffs, the acts to influence government action were immune even though the plaintiffs might have "sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action..." 365 U.S. at 143.

The Court in Noerr immunized genuine attempts to influence governmental action even where the result might be a restraint of commerce and a competitor might be directly injured. This principle was applied to attempts to seek

administrative action in United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) and to the institution of lawsuits in Motor Transport, supra.

The Noerr-Pennington doctrine applies to the Examiners' acts as alleged in Ronwin's complaint. Arizona Supreme Court Rule 28(a) creates a duty that the Examiners ask the Court to grant or deny admission to each applicant:

[T]he committee shall examine applicants and recommend to this court for admission to practice applicants [who are qualified].... The court will then consider the recommendations and either grant or deny admission.

The Examiners' role is to recommend applicants for admission; the Arizona Supreme Court grants or denies admission.

Ronwin's allegations are consistent with the role prescribed

for the Examiners by Rule 28(a). For example, Ronwin alleges that the Committee "presided over and conducted the process by which applicants for membership ... were examined ... so as to permit a decision on whether or not applicants were to be admitted to said Bar." (Complaint, J.A. 7-8, ¶ II).

The Examiners' actions in recommending to the Arizona Supreme Court that it deny Ronwin's admission to the bar falls within the Noerr-Pennington exemption for two reasons. First, the Examiners' action did not injure Ronwin. They did not have the power to admit or deny his admission. Only the Arizona Supreme Court has such power. Thus, as this Court stated in Noerr, 365 U.S. at 136, "[W]here a restraint upon trade ... is the result of valid

governmental action ... no violation of the Act can be made out." Accord, Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F.Supp. 696 (D.Colo. 1975); In re Airport Car Rental Antitrust Litigation, 521 F.Supp. 568 (N.D.Cal. 1981), aff'd on other grounds, 693 F.2d 84 (9th Cir. 1982). If Ronwin was injured, it was by the valid act of the Arizona Supreme Court. The Examiners' attempts to influence that decision did not cause any "injury of the type the antitrust laws were intended to prevent...." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

Second, the Examiners' conduct was not intended to achieve anything but governmental action. Ronwin did not allege that the

Examiners directly interfered with his contracts or competitive advantage. Rather, the Examiners only undertook action they were allowed and indeed required to do by law: recommend persons for admission by the Arizona Supreme Court.^{10/}

Nor could Ronwin have alleged sufficient facts to take the conduct complained of out of the Noerr-Pennington immunity under the sham exception. The sham exception is based on allegations that the concerted effort was not to influence

^{10/}The fact that they were a governmental entity charged with the authority to recommend licensure should make no difference as to the interests served by the Noerr-Pennington doctrine. The doctrine has been applied to a professional licensing board. Bank Bldg. & Equip. Corp. of Am. v. Nat'l Council of Architectural Registration Boards & W. Virginia Board of Architects, 1975 CCH Trade Cas. ¶ 60,108 at 65,229 (D.D.C. 1975).

governmental action but only to directly restrain trade. As Professor Handler has explained,

[T]he California Motor Transport Co. plaintiffs carefully refrained from basing their cause of action upon any actual attempt to influence the course of administrative action. When the defendants met in February of 1961 they had no knowledge of the merits of any future application. All they knew was that the California PUC had traditionally adopted a liberal approach with respect to granting new operating rights, but according to plaintiffs' assertions, defendants specifically eschewed any attempt to change this agency attitude. The plan was not to influence government, but rather to deter competitors from making applications that would set the public decision-making apparatus into motion. Such a scheme, if proven, would be embraced by the sham exception since it involved nothing more than a direct restraint on competitors.

Handler, "Twenty-Five Years of Antitrust, "73 Colum.L.Rev. 413, 436-437 (1973).

In contrast to Motor Transport, Ronwin did not and could not allege that the actions were "to

harass and deter [respondent] in [his] use of administrative and judicial proceedings so as to deny [him] 'free and unlimited access' to those tribunals." Motor Transport, 404 U.S. at 511. Nor did he allege that an abuse of process has barred him from access to neutral review. 404 U.S. at 513.

Ronwin has not alleged that the Examiners' recommendations to the Arizona Supreme Court were a sham. Nor can he successfully amend his Complaint to so allege.^{11/} Based

^{11/}Even if he could, he should not be permitted to so amend. Permitting Ronwin to amend would have a chilling effect on the Examiners' First Amendment rights and fulfilment of their duties under Arizona law. Hydro-Tech Corp. v. Sundstrand Corp., 673 F.2d 1171, 1177, n. 8 (10th Cir. 1982) and Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977).

upon Ronwin's repeated suits to have the courts overturn the Committee's recommendations as well as the Arizona laws under which the Examiners acted, he cannot fairly allege a deprivation of access to the judiciary. The Examiners' only acts involved their duties to examine applicants to the bar so as to recommend applicants for bar admission to the Arizona Supreme Court. In addition, Ronwin has had access to the courts. He has petitioned the Arizona Supreme Court for review of the February, 1974 examination and the finding of the Committee that he was unqualified to take the July, 1974 examination. In re Petition of Ronwin, supra; Application of Ronwin, supra. Those petitions were denied as were Ronwin's petitions for writs of certiorari to this Court. Ronwin v. Comm. on

Examinations, supra; Application of Ronwin, supra. Ronwin has thus applied for relief. The fact that he failed to obtain relief is not significant: "Free access to the courts does not mean unopposed access." Wilmorite, Inc. v. Eagan Real Estate, Inc., 454 F.Supp. 1124, 1135 (N.D.N.Y. 1977), aff'd without opin., 578 F.2d 1372 (2d Cir. 1978), cert. denied, 439 U.S. 983 (1978); Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, supra.

Finally, while not determinative, the fact that Ronwin has been unsuccessful in seeking review is indicative that the Examiners have genuinely attempted to seek governmental action and not attempted an illicit restraint of

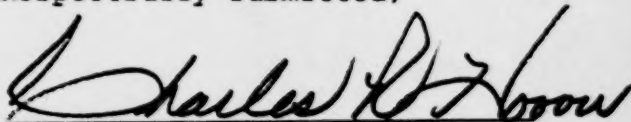
trade. Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975); Subscription Television, Inc. v. S. California Theater Owners Ass'n, 576 F.2d 230 (9th Cir. 1978)

If injured at all, Ronwin was injured only by governmental action and not by any direct personal act by the Examiners. Ronwin alleged nothing more than that the Examiners attempted to influence action by the Arizona Supreme Court. Such efforts are immune from antitrust liability under the Noerr-Pennington doctrine. The Court of Appeals should have affirmed the dismissal of the complaint on this basis.

CONCLUSION

For the reasons stated above, the order and opinion of the United States Court of Appeals for the Ninth Circuit should be reversed and the order and judgment dismissing respondent's complaint should be reinstated.

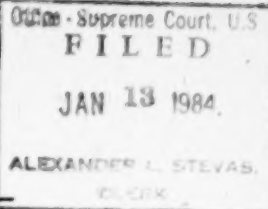
Respectfully submitted,



CHARLES R. HOOVER
111 West Monroe
Phoenix, Arizona 85003
(602) 262-5911
Petitioner in Propria Persona
and Counsel for the Remaining
Petitioners

JEFFERSON L. LANKFORD
DONN G. KESSLER
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
602/262-5911
Of counsel for Petitioners

August 15, 1983



No. 82-1474

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN,
ROBERT D. MYERS and HAROLD J. WOLFINGER
Petitioners,
vs.
EDWARD RONWIN,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF THE PETITIONERS

CHARLES R. HOOVER
111 West Monroe
Phoenix, Arizona 85003
(602)262-5911
Petitioner in Propria
Persona, and Counsel for
the Remaining Petitioners

JEFFERSON L. LANKFORD
DONN G. KESSLER
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
(602)262-5911
Of Counsel

On January 11, 1984, Petitioners received a recent decision of the Ninth Circuit Court of Appeals related to an issue presented by this case. As Petitioners could not refer to this decision in their previously filed Reply Brief, Petitioners submit this supplemental brief to bring this decision to the Court's attention.

On December 23, 1983, the Ninth Circuit Court of Appeals ruled that an action brought in state court under a state antitrust act barred, under res judicata, the bringing of the same action under the federal antitrust laws. Derish v. San Mateo-Burlingame Board of Realtors, 1984-1 CCH Trade Cas. ¶ 65,771 (No. 83-1791, 9th Cir. 1983).

This decision is significant to the issue of res judicata presented

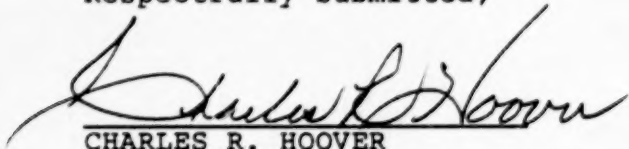
by this case. Ronwin specifically requested relief from the Arizona Supreme Court under appropriate state procedures alleging the same antitrust claim he later made in federal court. In re Petition of Ronwin, S.B. 52 (Supreme Court of Arizona 1974), cert. denied sub nom, Ronwin v. Committee on Examinations and Admissions of the Supreme Court of Arizona, 419 U.S. 967 (1974).

As the Ninth Circuit held in Derish, supra, the identity of those claims and the policies underlying res judicata outweigh the policies underlying exclusive jurisdiction of federal antitrust claims in federal courts. The reasoning of the Court of Appeals calls for the application of its holding to the facts in this case. The fact that Ronwin requested different relief--admission then, damages now--is irrelevant.

CONCLUSION

For the reasons stated above and in the Brief for the Petitioners and the Reply Brief of the Petitioners, the order and opinion of the United States Court of Appeals for the Ninth Circuit should be reversed and the order and judgment dismissing respondent's complaint should be reinstated.

Respectfully submitted,

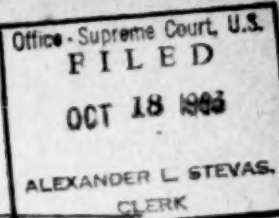


CHARLES R. HOOVER
111 West Monroe
Phoenix, Arizona 85003
(602)262-5911
Petitioner in Propria
Persona, and Counsel for
the Remaining Petitioners

JEFFERSON L. LANKFORD
DONN G. KESSLER
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
(602)262-5911
Of Counsel for Petitioners

January 12, 1984

No. 82-1474



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN,
ROBERT D. MYERS and HAROLD J. WOLFINGER,

Petitioners,

vs.

EDWARD RONWIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

EDWARD RONWIN
Attorney at Law (Iowa)
P.O. Box 3585
Urbandale, Iowa 50322
(515) 223-8819
Respondent pro se

QUESTIONS PRESENTED FOR REVIEW

- I. WAS THE GRADING PROCEDURE EMPLOYED BY PETITIONERS FOR THE FEBRUARY, 1974 ARIZONA STATE BAR EXAMINATION CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED BY THE STATE OF ARIZONA ACTING AS SOVEREIGN; AND, IF SO, DID THE SOVEREIGN ACTIVELY SUPERVISE THE GRADING?
- II. ON THE ASSUMPTION, ARGUENDO, THAT THE ISSUE IS PROPERLY BEFORE THIS COURT, AS PETITIONERS ARGUED IN THEIR PETITION FOR CERTIORARI AT 18-20, AND IN THEIR BRIEF AT 74-87, IS THE NOERR-PENNINGTON DOCTRINE APPLICABLE TO PETITIONERS?
- III. CAN A STATE EVER USE ANY PROFESSIONAL OR OCCUPATIONAL LICENSING EXAMINATION, OR ANCILLARY PROCEDURE, FOR THE PRIMARY PURPOSE OF LIMITING THE NUMBER OF LICENSEES RATHER THAN TO DETERMINE THE INDIVIDUAL QUALIFICATIONS TO PRACTICE OF EACH APPLICANT?

IV. DID THE NINTH CIRCUIT ERR IN AFFIRM-
ING THE DISMISSAL OF THE SPOUSES OF
THE INDIVIDUAL DEFENDANTS?

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No. 82-1474

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN,
ROBERT D. MYERS and HAROLD J. WOLFINGER,

Petitioners,

vs.

EDWARD RONWIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

STATUTORY PROVISIONS AND RULES INVOLVED
(Additional to and amplifying those found
in Petitioners' Brief on the Merits)

See Appendix ("App.") at 1-9, App.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is
partially inaccurate, argumentative and
fails to present pertinent details.

Respondent ("Ronwin") did not allege that "he did not receive a passing grade on the [1974] examination," Petitioners' Brief, 14; c.f., Complaint, ¶'s VII-IX, J.A. 10-12.

Petitioners fail to explain, as pled in the Complaint, ¶IV, J.A.9, and as admitted in Petitioners' Answer, ¶3, J.A.17, that Petitioners informed Ronwin and the other examinees that examinees who achieved the pre-set standard of a grade of 70 or more passed the examination and "...shall be recommended for admission to the Bar," 17A A.R.S., Rule 28(c)VIII, 6-7, App.

Petitioner Hoover informed Ronwin that Petitioners did not grade on a 0-100 scale;¹ rather, Petitioners used raw scores and after the results were known in raw score terms, a raw score was picked as equal to 70, "thereby the number of bar applicants who would

¹ Nevertheless, the ultimate grades that Petitioners reported were in a form reflecting a 0-100 scale of grading.

receive a passing grade depended upon the exact raw score value chosen as equal to 70, rather than [on the] achievement by each Bar applicant of [the] pre-set standard [of 70]," Complaint, ¶VI, J.A.10.

That grading procedure was in conflict with the Arizona Supreme Court's expressed policy, 17 A, A.R.S., Rule 28(c)VIII,6-7, App., and gave rise to the anti-competitive effect challenged by Ronwin.

Ronwin also takes issue with footnote 3, Petitioners' Brief,15-16. Ronwin pled, Complaint, ¶VIII, J.A.11-12:

When Plaintiff complained of the unlawful behavior of the Defendants, recited above, using the procedures provided by the rules of the Supreme Court of Arizona for said purpose, the Defendants without notice, hearing or medical examination, falsely and maliciously labelled the Plaintiff as 'mentally unable to engage in the active and continuous practice of law,' and, denied Plaintiff the right to take the July, 1974 Bar examination.

Proof: Defendant, George Read Carlock submitted an affidavit to the Arizona Supreme

Court (copy is Exh. C to Ronwin's Response to Appellees' [First]"Petition for Rehearing.." in 9th Circuit) in which Carlock averred that, inter alia, as Ronwin had charged "...that the Committee's action constituted a conspiracy in violation of Section 1 of the Sherman Act," he [Carlock] "...believed that the Committee could not appropriately find that [Ronwin] was mentally and physically able to engage in the active and continuous practice of law." see p.3, line 29 to p.4, line 11, Carlock's affidavit.

Ronwin also noted for the District Court, Ronwin's Response to Defendants' Motion to Dismiss, p.2, lines 2-12; and for the 9th Circuit, Ronwin's Opening Brief, p.12, that:

Indeed it was only after [Ronwin] exercised his First Amendment right and criticized the manner of grading said examination that [Ronwin's] mental fitness [and physical fitness] was first questioned. Thus in his deposition in cause No. CIV 78-214 [District Court], CARLOCK admitted that he had no specific reason to raise the question about [Ronwin's] mental ability, but in attempting

to cloth his charge, and that of the Committee he headed, with some credibility, CARLOCK asserted that it was [Ronwin's] attack on the manner of grading which he considered 'wrongheaded' and which gave rise to his, and said Committee's, initiation of the charge that [Ronwin] was not mentally able [and physically able] to practice law.

The vicious assault on Ronwin's mental ability (and even physical ability-later dropped) to practice law originated in lawlessness, and the same lawlessness, and fraud, characterized the hearing and result before the special committee, (which replaced the "regular" committee on which Petitioners served and which fact is not made clear in Petitioners' footnote, but is made clear in the Petition for Certiorari, fn. 3 at 4).

Although some elements are outside the immediate record, matters concerning Application of Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976), also referred to in Petitioners' footnote no. 3, are given in footnote here so that this Court can have a fuller understanding of what occurred in connection

with Ronwin's challenge to the 1974 grading process.²

² Application of Ronwin rests on the statement, 555 P.2d at 317:

In summary, there is significant expert testimony in the record to indicate that Ronwin has a "paranoid personality..."

The only expert to testify against Ronwin was a psychologist, Dr. Francis A. Enos. At the hearing on Ronwin's latest application for admission to the Arizona State Bar before the Arizona Supreme Court on December 16, 1982, Justice Francis A. Gordon, Jr., who wrote Application of Ronwin, carried on a discussion with Ronwin. Ronwin read two examples of Enos' perjury, which are in the record of said special committee, to Justice Gordon, who, on being asked, did not deny that Enos lied in his testimony. Neither did Justice Gordon deny that those examples and others of Enos' perjury had been brought to the attention of himself and the Arizona Supreme Court before Application of Ronwin was promulgated; and, that, as against Enos, that Court had the testimony of 3 psychiatrists who reported that Ronwin did not suffer from any mental illness and was not a paranoid personality. Two of those experts also informed the Arizona Supreme Court that the condition of "paranoid personality" was not a serious matter nor did it disable anyone from conducting normal professional work. Neither did Justice Gordon deny that some 12 Arizona attorneys testified that Ronwin was not mentally ill. The Dean of the Arizona State Univ. Coll. of Law testified to Ronwin's good mental health and legal ability as did another professor. When asked during the dialogue how he could justify the above-quoted statement from Application of Ronwin, Justice Gordon claimed it was "the record." Since Application of Ronwin appeared 4 more experts, making a total of 7 (6 psychiatrists and 1 psychologist) have told the Arizona Supreme Court that Ronwin is not

Petitioners exclaim, Petitioners' Brief 16:

The law considered by the courts below showed that Arizona has a clearly articulated affirmative policy restricting competition in legal services.

The Ninth Circuit, which was a "court below", held the opposite view, Ronwin v. State Bar of Arizona, 686 F.2d 692, 698 (9 Cir. 1982).

In the Argument, §I.A., Ronwin challenges Petitioners' contention that they were empowered to "select a grading system," Petitioners' Brief, 16.

Petitioners' attempt to diminish the force and quality of the 9th Circuit opinion, Petitioners' Brief, 17-18, overlooks the fact that a majority of the eligible judges of the Ninth Circuit saw no reason to rehear

2-Cont'd.

mentally ill and is able to practice law. A total of 20 Arizona attorneys have done likewise. The Iowa Supreme Court, with the record of the Arizona Supreme Court before it in 1977, held Ronwin mentally able to practice law.

When the tactics against dissent common in the Soviet Union are adopted by Petitioners and the other Defendants, and by the Arizona Supreme Court, this Court should become very concerned.

the matter en banc, see Order, ¶2, J.A. 172-173.

SUMMARY OF ARGUMENT

Petitioners' version of the applicable rules is in error.

The state-action exemption applies, for both official and private bodies, when the sovereign units of the State (i) clearly articulate and affirmatively express a policy whose purpose and effect is anti-competitive, and (ii) when that policy is actively supervised by the sovereign, which is the Midcal test. At least the first prong of the Midcal test applies to Petitioners.

Ronwin does not complain of the anti-competitive effects which are incident to a bar examination whose purpose is to determine each examinee's aptitude to practice law according to a pre-set standard; Ronwin does complain of Petitioners' use of a grading process which converted instant bar examination to a mechanism for choosing the number

of examinees admitted to practice law without regard to their individual ability, which purpose was not clearly articulated nor affirmative expressed by the sovereign concerned. Petitioners fail both the Mid-cal test and their own suggested test.

The Feldman case does not apply herein and, in any event, ought to be overruled.

Scaled scoring is a myth which enables bar examiners to manipulate the numbers of admitted examinees. The active supervision prong is an essential ingredient of and inseparable from the first prong of the Mid-cal test.

No immunity, "official" or judicial, covers Petitioners. Petitioners are not protected by the Noerr-Pennington doctrine.

Any bar examination whose purpose and/or grading is aimed at other than measuring examinees' own ability to practice law is violative of the 5th and 14th Amendments.

ARGUMENT

I. THE GRADING PROCEDURE EMPLOYED BY PETITIONERS FOR THE FEBRUARY, 1974 ARIZONA STATE BAR EXAMINATION WAS NOT CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED BY THE ARIZONA SUPREME COURT ACTING AS SOVEREIGN; AND, IN ANY CASE, THE SOVEREIGN DID NOT ACTIVELY SUPERVISE THE GRADING.

A. Clarification of Confusion Over Which Arizona Supreme Court Rules Applied At Times Relevant Hereto.

Petitioners' version of Rules 28(c)VII A and B, and 28(c)VIII A, which they claim were in force during the examination in contention, are given at 7-9, App., see also Petitioners' Brief, 9-10, 68,fn.16. Ronwin believes that the correct version of the rules is that given at 5-7, App. The order allegedly promulgating Petitioners' version of the rules was dated January 11, 1974 and ordered that the rules therein be effective January 15, 1974. A copy of the

certified order is attached to Petitioners' (First) "Petition for Rehearing..." filed in the Ninth Circuit phase of the case. That, however, was contrary to Arizona law.

A.R.S., §12-109, at 3-4, App., provides that any rules of court promulgated by the Arizona Supreme Court shall be printed and distributed to all members of the state bar and to other persons who apply (sub-section B, §12-109, at 4, App.,) and that, "[t]he rules shall not become effective until sixty days after distribution," §12-109(C) at 4, App. (emphasis added). Hence, the order of January 11, 1974 promulgating Petitioners' version of the rules could take effect, assuming arguendo that the required distribution took place, A.R.S., §12-109(B), no earlier than March 12, 1974, which was eleven (11) days after the February, 1974 examination had ended.

A copy of an order of the Arizona Supreme Court, dated June 18, 1955, is shown at 9-

11, App. Said order appears on p.2 of the hard-bound volume of 17A, A.R.S., and on p. 464 of a soft-bound "pamphlet" labelled, "Arizona Rules of Court," which accompanies the Arizona Revised Statutes and contains all rule amendments to August 15, 1982. The rules in the "pamphlet" are identical to the texts found in Vol. 17A as modified by the 1982-1983 pocket part. Said order marks the rules which follow it in Vol. 17A and in the pamphlet as the official publication of the Arizona Supreme Court rules. The replication of said order in the latest pamphlet shows that the June 18, 1955 order retains its vitality to the present; and, ¶3 of said order shows cognizance of, and obedience to, the terms of A.R.S., §12-109(C), at 4, App.

In Arizona, §12-109 is, pursuant to A.R.S., §12-111 (at 4, App.), a "rule of court" which can be modified or suspended "by rule promul-

gated by the [Arizona] Supreme Court," at 4, App. However, there has never been a modification or suspension of the terms of §12-109 such as occurred, in part, with A.R.S., §12-409, concerning recusal of State judges, when the Arizona Supreme Court adopted Rule 42(f), Ariz. R. Civ. Proc., Vol. 16, A.R.S., pp. 325-330; see Del Castillo v. Wells, 22 Ariz. App. 21, 523 P.2d 92, 95 (1974). Indeed, the continuing vitality of the order of June 18, 1955, and the continued presence of §12-109 in the A.R.S., shows that the Arizona Supreme Court has continued to respect the terms of §12-109 from its inception to the present.

In 1960, the Arizona Constitution was amended and the Arizona Supreme Court was given the exclusive power to make rules relative to procedural matters in any [State] court, Ariz. Const., Art. 6, §5, (added 1960); nevertheless, as held by the Arizona Supreme Court itself, "'statutory rules [such as

§12-109] remain in effect until modified or suspended by the rules promulgated by the [Arizona] supreme court," State v. Blazek, 105 Ariz. 216, 462 P.2d 84, 85 (1969).

Clearly, Ronwin's version of the rules, at 5-7, App., apply to this case. Petitioners' version of Rule 28(c)VIII requires a "passing grade," 8-9, App.; whereas, Ronwin's version designates 70 or more as the passing grade, 6-7, App. Even under their version, Petitioners are bound by the pre-set passing grade of 70, since they admit, Answer, ¶3, J.A.17, Ronwin's allegation that they announced 70 to be the passing grade, Complaint, ¶IV, J.A. 9. However, as the other variances between the two versions may have some effect on what the Arizona Supreme Court "clearly articulated and affirmatively expressed," and to dispell the incipient confusion, this detour on the rules was appropriate.

B. When Does the State-Action Exemption
From Antitrust Law Apply?

From Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L.Ed. 315 (1943) to Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982), this Court has developed a test to determine when a state action restraining trade or commerce is exempt from antitrust sanctions. In Goldfarb v. Virginia State Bar, 421 U.S. 773, 791, 95 S.Ct. 2004, 2015, 44 L.Ed.2d 572 (1975), this Court said:

It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

In an action where the State, in the form of the Arizona Supreme Court, was "the real party in interest," Bates v. State Bar of Arizona, 433 U.S. 350, 361, 97 S.Ct. 2691, 2697, 53 L.Ed.2d 810 (1977), reh. den. 434 U.S. 881, 98 S.Ct. 242, this Court,

at first, reiterated the Goldfarb theme,
433 U.S. at 360, 97 S.Ct. at 2697:

That court is the ultimate body wielding the State's power over the practice of law, * * * thus the restraint is 'compelled by direction of the State acting as sovereign,' (citing Goldfarb).

But then, this Court expanded the element of sovereign compulsion by adding the need for clarity of sovereign command and the need for active State supervision, 433 U.S. at 362, 97 S.Ct. at 2698:

[W]e deem it significant that the state policy is so clearly and affirmatively expressed [by the command of the Arizona Supreme Court under its Rules 27(a) and 29(a), and its Disciplinary Rule 2-101(B), 433 U.S. at 360, 97 S.Ct. at 2697] and that the State's supervision is so active. (bracketted phrase and emphasis added).

A year later, a plurality of this Court in City of Lafayette, La. v. La. Power & Light Co., 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) slightly enlarged the test to one which requires that a State policy which engenders an anticompetitive restraint be:

clearly articulated and affirmatively expressed as state policy (emphasis added),

and that the State's policy be actively supervised by the sovereign.

Subsequently, this Court noted that the "clearly articulated and affirmatively expressed" standard has been adopted by a majority of the Court, City of Boulder, 455 U.S. at 51, 102 S.Ct. at 840, citing New Motor Vehicle Board of Calif. v. Orrin W. Fox, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978) and California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). That standard also includes the requirement of active State supervision, Midcal, 455 U.S. at 105, 100 S.Ct. at 943.

Petitioners have been referring to that test as the Midcal test; Ronwin will follow suit.

"Clear" and "clearly" suggest without doubt, obscurity, ambiguity or confusion,

Random House Dictionary of the English Language, unabridged ed., N.Y. (1967), pp. 274-275.

It is well that this Court has come to require clear articulation of sovereign compulsion of any State policy which would nullify the reach of federal antitrust law, since, United States v. Topco Associates, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972):

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms...

and, through the Sherman Act, City of Lafayette, 435 U.S. at 398, 98 S.Ct. at 1129:

...Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country.

This Court may take judicial notice that in the great ideological conflict with the

"Eastern Bloc," this nation prides itself on its commitment to free enterprise.

Quoting Parker, this Court in City of Boulder, 455 U.S. at 53, 102 S.Ct. at 842, observed that ours is a dual system of government.

That is true; but its parts, federal and state, are not equal. It is not even describable as a system of primus inter parus. It is a system of supremacy of the federal government over any, and all, state governments, U.S. Const., Art. VI, Cl. 2. The authority of Congress to promulgate the antitrust laws flows from the Commerce Clause, U.S. Const., Art. I, §8, Cl.3, which is the powerful tool whereby Congress since the early Thirties has worked a revolution in our social, political and economic fabric.

Before the States are allowed to override the "Magna Carta of free enterprise;" to override an essential linchpin in Amer-

ican ideological commitment; and to override the supremacy of Congressional acts, the States ought surely be required to do so only by a clear articulation and affirmative expression of the anticompetitive policies they seek to promote thereby and the States ought to be required to strictly supervise any such clearly articulated and affirmatively expressed policies regardless of whom, public or private, the States appoint as enforcers thereof. Perhaps a third element ought to be added to the Midcal test requiring the States to describe and to justify the compelling, or at least rationally related, interest in curtailing the competitive, economic behavior of those within the State.

C. What Test Applies to Petitioners?

Petitioners claim that the Midcal test does not apply to them, Petitioners' Brief 33; rather, as "state officials" they claim that, Petitioners' Brief, 33-34:

...this Court has consistently held that when governmental conduct is at issue, the test for state action immunity is whether the State has clearly articulated an affirmative policy designed to supplant competition with regulation, and whether the policy contemplated the challenged action. New Motor Vehicle Board v. Orrin W. Fox, supra; City of Lafayette, supra.

The claim of two different tests is repeated a number of times in Petitioners' Brief, e.g. at 37, 39-40, 41-42, 43.

Preliminarily, Petitioners fail, in the quotation above, to point to what part of the decisions in either Orrin W. Fox or City of Lafayette support their view. But, in any case, they misstate the facts since, as quoted above, 16-17, from City of Lafayette, 435 U.S. at 410, 98 S.Ct. at 1135, this Court states what became the Midcal test therein; and, in Orrin W. Fox, the first part of the Midcal test is given, 439 U.S. at 109, 99 S.Ct. at 412 and in the next paragraph, the Court shows its concern for the second part of the Midcal

test by stating: "The duration of interim restraint is subject to ongoing regulatory supervision," 439 U.S. at 110, 99 S.Ct. at 412 (emphasis added).

Petitioners' claim that one test is applicable to private parties and another to public parties finds no support. In fact, not only do the authorities that Petitioners quote hold to the contrary (see preceding paragraph, supra), but in Bates, where the State was attacked, the standard that became Midcal was declared, as quoted hereinabove at 15-16.

From time to time this Court, or individual Justices, have made comments that would appear to imply a distinction between an antitrust charge against public officials rather than against private parties; see Justice Stevens' concurring opinion in City of Boulder, 455 U.S. at 59, fn. 2, 102 S. Ct. at 844, fn. 2; however, one cannot discern proof of Petitioners' claim that this

Court has declared different tests for each category of defendant.

Both tests described by Petitioners have the identical first prong; i.e., the "clearly articulated and affirmatively expressed" requirement, Petitioners' Brief, 33-34; and, it is submitted that it may become academic as to whether or not the second prong of the Midcal test applies to Petitioners, as Ronwin believes, or the "contemplated activity" prong applies as Petitioners claim; since, as this brief unfolds, it will be obvious that as to Petitioners, the "clearly articulated and affirmatively expressed" part of the Midcal test or of Petitioners' suggested test has not been satisfied.

D. Just What Is Ronwin's Complaint?

Petitioners argue that, Petitioners' Brief, 57:

[Petitioners] acted as state officials under a clearly articulated state pol-

icy to supplant competition in legal services with regulation. See also Petitioners' Brief, 61-62.

At all times relevant hereto, and whether under the version of the rules contended for by Ronwin ("Ronwin's version"), or the version advocated by Petitioners, ("Petitioners' version"), Argument, §I.A., supra, there did not exist a "clearly articulated state policy [of Arizona] to supplant competition in legal services with regulation."

Under either version of the rules, the only possible rules of the Arizona Supreme Court from whence the alleged "clearly articulated state policy" may be discerned are Rules 28(a); 28(c)VII and 28(c)VIII.

Rule 28(a) is identical in either version, 5-6, 7, App. Said rule ordered Petitioners to examine applicants (for their own ability to practice law-implied) and to recommend to the Arizona Supreme Court for bar admission applicants who were found

by Petitioners to have the necessary qualifications. There is no command in Rule 28(a) to "supplant competition with regulation."

Ronwin's version of Rule 28(c)VIII, 6-7, App., ordered Petitioners to recommend for bar admission all applicants "who receive a grade of seventy or more," and Rule 28 (c)VII, 6, App., merely lists the subjects upon which applicants would be tested.

Under Ronwin's version, the only clearly articulated policy of the Arizona Supreme Court is that Petitioners were to determine by examination the ability of each, individual applicant by grading the examinations on a 0-100 scale and declaring all those who achieved a total grade of "seventy or more" to have passed the examination. That is not a clearly articulated policy to "supplant competition in legal services with regulation." It is a policy directed fundamentally at determining the qualified from

the unqualified and not directed, per se, at limiting the numbers of admitted applicants. In essence, it is a regulatory policy which may have incidental anticompetitive effects; i.e., those applicants not attaining a grade of "seventy or more" cannot be admitted to the bar and hence cannot compete for legal work. Yet, under the policy, it is quite possible to have no anticompetitive effects; e.g., every applicant achieves a grade of "seventy or more."³

³In Wyoming, the pass percentage on the Winter examinations in 1974 and 1975 was 100 each time; in South Dakota, the 100 percent passing rate was achieved in the 1974 examination. See National Bar Examination Digest, 1977 Ed., Harcourt Brace Jovanovich, Wash. D.C., pp. 42,48. In North Dakota, the 100 percent pass rate was observed in the summer examination in 1978 and in the winter examination of 1979 (a 99% pass rate was obtained in the summer of 1979). In West Virginia, the 100 percent pass rates were observed for both examinations given in 1977 and on the winter examination in 1978. See BAR/BRI Digest, 1981 Ed., Harcourt Brace Jovanovich, Wash. D.C., pp. 29, 38. It may be noted that for many of the examinations whose results are reported in said digests, passing rates of 90% or more are not uncommon, which shows that relatively small anticompetitive effects are involved. All of the States

The anticompetitive effects that would have been incidental to the pass-fail experience if Petitioners had obeyed the sovereign's command, (under Ronwin's version) are not being complained of by Ronwin.

However, instead of grading on a 0-100 scale without gimmicks, Petitioners employed a raw score system. After the raw scores were obtained, Petitioners picked a raw score as equal to seventy. Thus, the number of applicants passing the examination and thereby recommended for admission to the bar, depended upon which raw score was taken as seventy. Furthermore, since the raw score taken as equal to seventy was the result of an averaging process of all the raw scores, said raw score, and consequently the "seventy" to which it was equated, was

3 Cont'd.

mentioned above employed the Multi-State and essay examination combination as did Arizona on the examination in contention herein.

thereby divorced from the individual achievement of an actual, pre-set grade of seventy based on a true 0-100 scale, Complaint, ¶VI, J.A. 10.⁴

In effect, Petitioners were no longer determining each applicant's own ability to practice law based on a pre-set standard, but were using the examination as a means to recommend for admission (in practice virtually equivalent to admission) the particular number of examinees that suited Petitioners' personal notion of how many new lawyers the profession in Arizona could

⁴It is appropriate to recall that "[f]or purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted...And, the complaint is to be liberally construed in favor of plaintiff," Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843, 1849, 23 L.Ed.2d 404 (1969), reh. den. 396 U.S. 869, 90 S.Ct. 35, 24 L.Ed.2d 123. Furthermore, "...a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which could entitle him to relief," Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

absorb at that time, Complaint, ¶VII, J.A. 10-11.⁴

It is this latter anticompetitive effect produced by the violation of the articulated policy of Arizona to determine the qualifications of each applicant, individually, which has drawn Ronwin's fire.

Nor does Petitioners' version of the rules lend them comfort. Rule 28(a) is identical in both versions, hence, as discussed above at 24-25, the rule is not a command to "supplant competition with regulation."

None of the discretionary allowances in Petitioners' version of Rules 28(c) VII and VIII, 7-9, App., convert the primary thrust of the rules involved, including the provisions of Rule 28(a) from the objective of using the examination to determine the qualifications of individual bar applicants to a "clearly articulated and affirmatively expressed" command to Petitioners to employ the examination for the primary purpose of

limiting the numbers of admitted bar applicants to the number Petitioners think proper. That is particularly true, since, Petitioners admit, Answer, ¶3, J.A. 17, Ronwin's allegation that Petitioners fixed the "passing grade" at the pre-set standard of 70, Complaint, ¶IV, J.A. 9, which puts Petitioners in the same situation as they are under Ronwin's version of the rules.

In any event, no interpretative permutations or combinations of the rules, under either version, provides Petitioners with any evidence of an order to which they can point wherein the Arizona Supreme Court, as sovereign in the relevant area of governmental activity, Bates, 433 U.S. at 359-360, 97 S.Ct. at 2697, "clearly articulated and affirmatively expressed" its command that the bar examination was to be used for the primary purpose of limiting the numbers of admitted applicants rather than as a tool to determine the individual qualifications

of each applicant by a pre-set standard. That is precisely the major point upon which the Ninth Circuit based its decision, Ronwin, 686 F.2d at 698.

Moreover, as Ronwin has noted, Ronwin's Opening Brief in the 9th Circuit, at 15:

...the Arizona Supreme Court would most likely not promulgate a directive to [Petitioners] requiring or compelling the use of the Bar examination to control the numbers admitted for anti-competitive purposes, since, on the two occasions when the percent admitted applicants fell into the fifty percentile area [1974 and 1976, 11, App.], the Deans of both law schools in Arizona led the public outcry against [Petitioners'] grading results.

Instant case reflects Petitioners' efforts to achieve via the backdoor what would be most impolitic if clearly articulated and affirmatively expressed; i.e., an avowed policy to use the bar examination for deliberate anti-competitive purposes; which outrages the American concept of equal opportunity in a competitive economy, and is as pernicious and lacking in any redeeming virtue

as horizontal price-fixing and therefore is a per se violation of, and preempted by, federal antitrust law, Rice v. Norman Williams Company, ___ U.S. ___, 102 S.Ct. 3294, 3299 (1982), fn. 5.

Petitioners neither come within the Midcal test, as held by the Ninth Circuit, Ronwin, 686 F.2d at 698; nor, the test which Petitioners champion, Petitioners' Brief, 33-35.

E. Does Petitioners' Status Provide Immunity to Petitioners?

Petitioners describe themselves as "state officials," Petitioners' Brief, 28.

The thread runs through Petitioners' argument that as "state officials" the "gauzy cloak of state involvement," referred to in Midcal, 445 U.S. at 106, 100 S. Ct. at 943, would not apply to them, Petitioners' Brief, 46-48, since:

...a state agency or official acting pursuant to a clearly articulated state policy is restrained from anti-competitive misconduct by the existence of the state policy and authorization for the official to act, Petitioners' Brief, 49.

However, as shown herein, Argument, §I.D., Petitioners, as "state officials", did not act pursuant to a clearly articulated state policy and, without restraint or authorization from the sovereign (the Arizona Supreme Court), freely engaged in anticompetitive misconduct, Ronwin, supra, 686 F.2d 696, 698.

Petitioners' unauthorized use of the grading process to control the numbers of admitted bar applicants was an unlawful extension and exploitation of Petitioners' mandate and represented a "private anticompetitive activity" which is no more protected than the fee-fixing activities of the cooperative action of the Fairfax County and Virginia State Bar Associations,

Goldfarb, 421 U.S. at 790-791, 95 S.Ct. at 2015; City of Lafayette, 435 U.S. at 417, 98 S.Ct. at 1138-1139.

For the preceding reasons, Petitioners' alleged status as "state officials" provides no shield for their liability herein; nor would their alleged status, per se, afford any protection, City of Boulder, 455 U.S. at 50, 102 S.Ct. at 842.

Petitioners' alleged defense as "state officials" is a variant of their overall claim of state action exemption, Petitioners' Brief, 25-62, and not an alleged defense of judicial or quasi-judicial immunity.

In the District Court, Petitioners raised the doctrine of judicial immunity as an affirmative defense, Answer, ¶9, J.A.18, stating, without more, that: "This action is barred by the doctrine of judicial immunity." That was Petitioners' last reference to any alleged defense based on judicial immunity

in the courts below. Nor have Petitioners attempted to erect a judicial immunity defense herein; and, Petitioners have confined themselves to the state-action issue, see footnotes 1 and 4, Petition for Certiorari, at i, 4. Petitioners have surely waived any defense said doctrine might have given them. Nevertheless, The State Bar of California ("SBC") has argued an alleged "official conduct" immunity which reduces to quasi-judicial immunity, SBC Brief at 20-25.

Ronwin believes that SBC lacks standing to erect the defense of judicial or "official" immunity for Petitioners and that, as amicus, SBC is confined to presenting its partisan view of such issues as are raised herein by the litigants; however, to avoid the peril of ignoring what may be a properly raised issue, a response, arguendo, is proffered hereby.

As above, Petitioners have certainly failed to press any alleged defense of ju-

dicial immunity and thereby have waived it.

Petitioners are not "judges"; at best, they might qualify as "quasi-judicial" officers with quasi-judicial immunity, Butz v. Economou, 438 U.S. 478, 512, 98 S.Ct. 2894, 2913, 57 L.Ed.2d 895 (1978); but, Petitioners would have both the burden to claim the immunity, Dennis v. Sparks, 449 U.S. 24, 29, 101 S.Ct. 183, 187, 66 L.Ed.2d 185 (1980), which Petitioners have waived, supra, and (if not waived), to demonstrate their entitlement to the immunity, id, 449 U.S. at 29, 101 S.Ct. at 187, which Petitioners have not attempted to do, supra at 34-35.

By their own assertions, Petitioners do not decide who is admitted to practice law, Petitioners' Brief at 80; that duty lies exclusively with the Arizona Supreme Court, 17A A.R.S., Rule 28(a), at 5-6, App.

While Petitioners recommend admission or denial, that function as to the passage

or failure of the bar examination is largely without discretion and predetermined since the applicable rules call for recommendation of examinees attaining a passing grade of 70 (Ronwin's version, Rule 28(c)VIII, at 6-7, App.) or a "passing grade" (Petitioners' version, Rule 28(c)VIII, at 8-9, App.) which "passing grade" Petitioners admit was chosen at 70 for instant examination, c.f. Complaint, ¶IV, J.A.9 with Answer, ¶3, J.A.17. Thus, Petitioners' activity with respect to the antitrust question herein, was not judicial but administrative and ministerial such as collection of examination data, proctoring and arranging for the examination, grading. While such acts may have some discretionary content, they never rise to a judgment status, c.f., District of Columbia Court of Appeals v. Feldman, ___ U.S. ___, 103 S.Ct. 1303, 1312 (1983). Therefore, "...the func-

tional comparability of [Petitioners'] judgments to those of the judge...", Butz, 438 U.S. at 512, 98 S.Ct. at 2913, is absent, and in that absence, "quasi-judicial" immunity is unavailable to Petitioners; see also Doe v. County of Lake, Indiana, 399 F. Supp. 553, 556 (N.D.Ind. 1975).

Assuming, arguendo, that Petitioners are draped with quasi-judicial immunity, can the defense hold under the circumstances of this case? It is obvious from the preceding quotation from Butz that what holds for judicial immunity is equally applicable to quasi-judicial immunity.

"[J]udicial immunity is not absolute and unlimited," Doe, id., 399 F.Supp. at 556. Judicial immunity from an action for damages is lost when the party acts in clear absence of jurisdiction or pursues nonjudicial activities, Thompson v. Montemuro, 383 F.Supp. 1200, 1206 (E.D.Pa. 1974).

Furthermore, "...when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost," Rankin v. Howard, 663 F.2d 844, 849 (9 Cir. 1980), cert den. sub. nom. Zeller v. Rankin, 451 U.S. 939, 101 S.Ct. 2020, 68 L.Ed.2d 326, and Rankin adds, 633 F.2d at 849: "...If his acts were part of a conspiracy, he is properly held responsible for the consequences."

In this case, Petitioners, (arguendo) qua judges, had their "jurisdiction" clearly set forth in the rules. Under Ronwin's version, at 5-7, App., or under Petitioners' version, at 7-9, App., under which Petitioners have admitted declaring a pre-set standard of 70, see 29-30, supra, the Arizona Supreme Court gave Petitioners the "jurisdiction" to determine the ability to practice law of each individual applicant. Such anti-competitive behavior as would accompany

the exercise of that "jurisdiction" was incidental to the purpose of the "jurisdiction." However, when Petitioners converted the purpose of the examination by use of the grading system to a mechanism for artificially determining the numbers of admitted applicants, see 27-29, supra, Petitioners knew, or should have known, that: (i) they were acting without "jurisdiction" and (ii) were acting in violation of 15 U.S.C.§1. Thereby, Petitioners lost their immunity--if they ever had any.

Petitioners proclaim their "official" status, Petitioners' Brief at 28. In truth, they serve parttime, unremunerated and without the welfare benefits common to regular Arizona state officials. Petitioners' true occupation is the fulltime, private practice of law with monetary profit as a major stimulus. As a consequence, Petitioners have a private, personal, pecuniary interest in

depressing the numbers of attorneys admitted annually to practice. Had Petitioners followed the clearly articulated and affirmatively expressed rule of the Arizona Supreme Court to use the examination to determine the individual capacities of applicants to practice law according to the preset standard, Petitioners' private, personal, pecuniary interest would have been separable from their duties; but, when Petitioners decided sua sponte to use an examination grading procedure to artificially control the numbers of admitted applicants, Petitioners' private, personal, pecuniary interest became, ab initio, inseparable from their illegal activities.⁵

⁵In February, 1974, the variation from the average admittance rate resulted in approximately 37-42 less admitted attorneys, see Ronwin's Response to Motion to Dismiss (in District Court), p. 5, and Ronwin's Opening Brief in the Ninth Circuit, pp. 17-18. The absence of 37-42 admitted attorneys was an actual or potential economic plus for each Petitioner and/or his firm.

In essence, Petitioners do attempt to draw the "gauzy cloak of state involvement," Midcal, 445 U.S. at 106, 100 S.Ct. at 943, over their activities and by their conduct brought themselves squarely within the Midcal test, which they fail.

To allow Petitioners to escape liability for damages would, in the circumstances, continue an economic reward for their illegal behavior which is unquestionably against public policy, Board of Trustees of Community College..v. Cook County College Teachers Union, 74 Ill.2d 412, 425-426, 386 N.E.2d 47, 53 (1979); Sedco Intern.S.A. v. Cory, 522 F.Supp. 254, 320 (S.D.Iowa 1981); and, does nothing to foster the purpose of judicial immunity which is to allow fearless decision making undeterred by the prospect of damage liability, Dennis, supra, 449 U.S. at 31, 101 S.Ct. at 188, Rankin v. Howard, 633 F.2d 844, 847 (9 Cir. 1980).

And, where the initiative and independence of the judiciary is not effectively impaired, the doctrine of judicial immunity does not hold, Shore v. Howard, 414 F.Supp. 379, 385 (N.D. Tex. 1976).

Beyond doubt, Petitioners are not entitled to the protection of quasi-judicial or "official" immunity.

F. Is the Feldman Case Applicable?

Petitioners' single, brief citation to the case of District of Columbia Court of Appeals v. Feldman, ___ U.S. ___, 103 S.Ct. 1303 (1983) is in a state-action immunity context, Petitioners' Brief at 42, rather than reference to Feldman's main thrust. SBC makes mention, too, but without force, SBC Brief at 6,7,23. On the other hand, Petitioners' amicus, The National Conference of Bar Examiners, ("NCBE") devotes a section of its Brief (at 12-14) to argue the alleged application of Feldman to this case.

The Feldman decision rests in major part on the terms of 28 U.S.C. § 1257, which requires that "final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by [this Court]..." (emphasis added), which NCBE recognized, NCBE's Brief at 12. However, the predicate which NCBE implies to be present; i.e., that a final judgment of the Arizona Supreme Court is being attacked, is absent. No judgment of the Arizona Supreme Court is under review in this action, see Complaint, J.A. 6-13.

What is attacked is a grading process which (i) was not clearly articulated and affirmatively expressed by the sovereign, and (ii) the conversion of a bar examination from a means to determine individual aptitude to practice law to a tool to artificially regulate the numbers of attorneys annually admitted to practice law.

Hence, Feldman's restriction on U.S. District Court jurisdiction is not applicable herein.

It has long been held that exclusive jurisdiction to hear federal antitrust claims lies in the U.S. District Courts, Feldman v. Gardner, 661 F.2d 1295, 1303 (D.C. Cir. 1981) and fn. 60; therefore, this action was properly commenced in the U.S. District Court⁶; and, if Petitioners' actions were not clearly articulated or affirmatively expressed by the sovereign, the Arizona Supreme Court, then the action may continue in the U.S. District Court which is the entire thrust of Goldfarb and is implicit in Bates.

⁶The predicates requiring the raising of federal questions in the Arizona Supreme Court are absent in this case, Feldman, 103 S.Ct. at 1315, fn. 16, since Ronwin is not attacking a final judgment of the Arizona Supreme Court, 44-45 supra, and as said Court is without jurisdiction to entertain a federal antitrust claim. In any event, Petitioners allege that Ronwin did raise antitrust violation in the State court, Petitioners' Brief at 15.

Since Petitioners and their amici have turned to Feldman, the quality of the decision deserves examination. Feldman approves a dichotomy whose first appellate announcement with any clarity is found in Doe v. Pringle, 550 F.2d 596 (10 Cir. 1976), cert. den. 431 U.S. 916, 97 S.Ct. 2179, 53 L.Ed.2d 227. The dichotomy ordains that constitutional challenges to a State's general rules governing bar admissions are cognizable in the U.S. District Courts, whereas, a claim based on constitutional grounds that the State has unlawfully denied a particular application for admission is reviewable, if at all, only in this Court, id., 103 S.Ct. at 1316.

The confinement of particular, individual claims to hearing in this Court on certiorari is allegedly dictated by the terms of 28 U.S.C. §1257, id., 103 S.Ct. at 1317. Although not identified in Feldman, the basis for the constitutional claims, whe-

ther general or particular challenges, usually stems from 28 U.S.C. §1983 and kindred statutes, and/or from 28 U.S.C. §1331. §1331 is its "own" jurisdictional statute; whereas, jurisdiction for §1983 is given in 28 U.S.C. §1343.

Both §§1331 and 1343 lodge jurisdiction of constitutional questions in the U.S. District Courts and, without doubt, are intended to permit enforcement of the fundamental rights of citizens as embodied in the Bill of Rights and such subsequent Amendments as the 14th. As shown by the approving quotation from MacKay v. Nesbitt, 412 F.2d 846 (9 Cir. 1969) on the "rule" of §1257, Feldman, continuation of fn. 16, 103 S.Ct. at 1316, the purpose of §1257 is respect for the principle of comity.

While not explicitly indicated, but referred to in Justice Stevens' dissent, Feldman, 103 S.Ct. at 1318-1319, the question as to particular, constitutional chal-

lenges facing this Court in Feldman was: which jurisdictional statute takes precedence; i.e., §1257 over §§ 1343 and 1331 or vice versa? The Feldman decision places §1257 above the latter two and thereby elevates the interests serving comity over those serving and intended to uphold and defend fundamental, constitutional rights. That must be error. Suffice it as partial proof that the members of this Court are specifically sworn to uphold and defend the Constitution, not comity.

Additionally, the absoluteness of the requirement that final judgments of a State's highest court can be reviewed "only in this Court. See 28 U.S.C. §1257," Feldman, 103 S.Ct. at 1311 (see also 1315) is absent from the statute whose language uses the permissive, "may," and not the peremptory, "shall," supra at 44. Thereby, Congress declared no absolute barrier to the jurisdiction of U.S. District Courts to hear

all constitutional challenges to bar admissions or other bar matters; and, as Congress specifically gave U.S. District Courts such jurisdiction in §1343, as in §1331, in unambiguous language, this Court lacked a legal basis for nullifying said jurisdiction as to particular, constitutional challenges arising after final judgments in bar matters.

§1257 also refers to "review" of final judgments within its compass. However, the constitutional questions which are raised in bar matters are usually not the essence of the resulting final judgments and, even where brought to the State court's attention, no facility for trial accompanied by proper due process, either exists or is extended to hear the civil rights complaints. As Justice Stevens notes, it is not a "review" of a final judgment which the U.S. District Courts would undertake under §§ 1331, 1343, Feldman, 103 S.Ct. at

1318; rather, the U.S. District Courts would be trying, de novo, civil rights actions on the question of the constitutionality of the procedures used by the State court or by a committee or agent appointed by the State court just as in the currently permitted jurisdiction of U.S. District Courts under Feldman for general, constitutional challenges to State rules and regulations in bar matters. The question of the bar admission or the disciplinary issue, per se, would not be "reviewed."

As to lawyers and bar applicants in conflict with bar and judicial authorities, the practical result of Feldman has been to approve past practice in various Circuits and now, nationally, future denials of the most fundamental, constitutional rights of members of those groups. Whereas an applicant for a medical, dental, contracting or other professional or occupational

license can come as of right to the U.S. District Courts with their particular, constitutional challenges, see dissent in Feldman, 103 S.Ct. at 1319, fn. 2, lawyers and bar applicants are confined to seek certiorari in this Court which is a matter of grace and is usually denied. Members of other professions and occupations can move to jury trial of their constitutionally based grievances but lawyers and bar applicants can be denied hearing with regularity and with foreclosure of any practical, efficacious route to enforcement of their civil rights.⁷

Feldman unconstitutionally relegates lawyers and bar applicants to second class

⁷Ronwin's last nine (9) applications for admission to the State Bar of Arizona have been denied without hearing and without elemental due process accorded. Ronwin's demands for hearing with due process safeguards have been rejected out of hand. Ronwin's efforts to obtain certiorari in this Court have met with similar denial. How does Ronwin enforce his civil rights or are Ronwin's civil rights less than those of other citizens?

citizenship contrary to this Court's specific holding in Spevack v. Klein, 385 U. S. 511, 516, 87 S.Ct. 625, 629, 17 L.Ed.2d 574 (1967).

G. Commentary on Selected Items in the Briefs of Petitioners and Their Amici.

Petitioners or their amici make various statements which are either incorrect or tend to mislead. For example, the conflict alleged in Petitioners' Brief at 69, between the Ninth Circuit opinion in Benson v. Arizona State Board of Dental Examiners, 673 F.2d 272 (9 Cir. 1982) and in Ronwin does not exist, Ronwin, 686 F.2d 696, fn.4. Space considerations prohibit other illustrations; however, the questions of scaled scoring and of active supervision require treatment.

1. On Scaled Scoring

Petitioners do not discuss the grading process they used; however SBC describes

scaled scoring and paints it as beneficial, SBC Brief at 7-8. NCBE also mentions the system, NCBE's Brief at 23 and fn. 8.

NCBE's claim that the Arizona Supreme Court did not specify "a particular method of grading...", NCBE Brief at 23, is erroneous in its reliance on Petitioners' version of Rule 28(c)VIII, see Argument, §I.A, supra; and is specious in arguing that Ronwin's version of said rule, "merely said 70 would be a passing grade, specifying neither the 0-100 grading Ronwin claims, nor the method for determining what grade to give an examination," NCBE Brief at 23.

It is universally accepted that a grade of 60, 70, 80, etc., on a school or other examination is invariably based on a 0-100 scale. NCBE forgets to acknowledge that the final bar examination results on the individual essay questions were reported on an obvious 0-100 scale.¹

The gist of SBC's and NCBE's description of "scaled scoring" is that the procedure is employed only as a means allegedly to "equalize" the difficulty of bar examinations from year to year. By their own admission, only a "limited number of repeat or control questions" are used for comparisons, SBC Brief at 7. Thus, most questions are de novo and not "equated." Since the answering and grading of essay questions is a highly subjective process, the scheme to "equalize" an entire examination by comparing results on a few repeat questions borders on nonsense. If "scaled scoring" was such an unqualified success at "equalization", then the percent passing for instant examination (Winter, 1974) should have been approximately 75% rather than 54%, and 75% rather than 58% for the Summer, 1976 examination, see App. at 11. The drop in percent passing for instant examination was equivalent to a reduction of approxi-

mately 29 percent in the number of admitted attorneys (compared to the four year average, 1973 to 1976), which translated to between 37 and 42 attorneys, see Ronwin's Response to Motion to Dismiss (in District Court), p. 5 and [Ronwin's] Opening Brief in the Ninth Circuit, pp. 17-18. These figures indicate that rather than equalize examination difficulty, the unauthorized method of grading was employed to reduce the numbers of admitted examinees.

By the amicus admission, scaled scoring involves pooling the results of the group of examinees and determining their relative performance, SBC Brief at 7, which, ipso facto, precludes grading their examinations so as to determine which examinees met the pre-set standard of 70, (whether in Ronwin's version of the rules or in Petitioners' version, since Petitioners adopted 70 as the pre-set standard, supra at 14,29-30). Furthermore, the very act

of choosing a raw score as equal to 70 is automatically and inseparably hinged to a determination of the number of admitted examinees.

The reason why SBC is so stirred herein is reflected in the pass percentage results from California when compared to States which, like California, use the one-day, multiple choice Multistate examination plus an essay examination; see results comparison at 12, App.

Can one seriously believe that the law in California is so much more difficult than in Utah, Texas and New Mexico (the latter two are community property States as is California) to justify an average pass percentage on the California bar examinations from 1973 to 1979, inclusive, of only 50.21% while Texas reports 87.76% passing and New Mexico experiences 71.71% for the same period, and Utah comes in with 91.67% (the 1976 figure was not available for Utah)?

Furthermore, "scaled scoring" can be discarded with no apparent ill effects which is what Arizona has apparently done. Thus, on the February and July, 1982 examinations, a pre-set score of 120 or more correct answers, out of 200 Multistate examination questions, was an automatic pass for that part of the examination. Similarly, each essay question was graded on a "pass" or "fail" basis. Seven "pass" scores out of ten essay questions chosen from a field of thirteen questions was taken as a passing grade for the essay portion of said examinations, c.f., NCBE Brief at 24, fn.9.

Contrary to the alarmist exclamations of SBC, Brief at 6, 17; NCBE, Brief at 8-11, the displacement of scaled scoring by Arizona with pre-set standards that are not surreptitiously manipulated by "raw scores" has not ended the bar examination, nor affected the quality of applicants admitted to practice law in Arizona.

Whatever the excuses given, "scaled scoring" is nothing more than a tool to control the numbers of admitted attorneys for sheer anticompetitive purposes. If equalization was the method's inevitable result, the pass percentages for California, Utah, Texas and New Mexico, as for all other States using a combination of the Multistate examination and essay examination should be very nearly identical from examination to examination and from year to year; but, they are not!

2. On Active Supervision

In the foregoing, it has been demonstrated that Petitioners fail the first prong of either the Midcal test, or their own test, Argument, §I.D., supra; therefore, the question of whether Petitioners were subject to active supervision is possibly moot. However, Petitioners, Brief at 50-53; SBC, Brief at 16, 19-20, and NCBE, Brief at 26-27, all address the question of what

type of supervision, if any, is required for persons such as Petitioners or for an agency on which they served. As noted by SBC, Brief at 19, the question of the degree of supervision required for governmental agencies or officials is unresolved by this Court.

Contrary to SBC's position, Brief at 16, and Petitioners' argument, Brief at 52, Ronwin does not suggest that "every regulatory detail" need be supervised; nor would that be a fair reading of the Midcal supervision requirement.

Since the question is intrinsic to the Midcal test featured herein and as this Court may wish to consider the question, even though it received scant attention below, Ronwin proffers the following:

The degree of supervision required for political subdivisions, agencies and officials will probably need an ad hoc determination in each case.

Analysis of the Midcal test reveals that both prongs are intertwined and that the test is as applicable to public bodies and officials as to private entities. This Court's cases reviewed at 15-20, supra, have stressed, in evolving language, the essential ingredient for state-action exemption: clear articulation and affirmative expression of the anticompetitive policy by the sovereign. The active supervision prong of the Midcal test is vital, regardless of whether public or private entities are involved, to ensure that it is the sovereign organs of the State and not other State agencies, or private parties, that clearly articulate and affirmatively express the State's anticompetitive policy. De minimus, that consideration gives rise to the need for active supervision which includes a requirement that the non-sovereign unit or individual, official or private, provide advance, overt

notification of record to the sovereign unit or individual of the detailed substance of any action, policy or decision whose intended introduction or enforcement is known, or should be known, to have an anti-competitive purpose and/or effect; and, concomitantly, the sovereign ought to be required to signify by a declaration of record its approval or disapproval prior to the initiation or effectuation of the action, policy or decision.

Active supervision needs to be particularly strict where, as herein, "officials" who are essentially full time practitioners of the profession or occupation, have an intrinsic, beneficial, economic interest in promoting anticompetitive schemes, see 40-41, supra; or, where, as here, a private guild, NCBE, exerts considerable and powerful influence on public bodies or officials, NCBE Brief at 3-5, and which, beyond the normal process of democratic selection, in-

serts itself into the body politic of the State's subdivisions and from that vantage point can and does cause harm and injury to the constitutional and other rights of citizens with relative impunity.

II. ON THE ASSUMPTION, ARGUENDO, THAT THE ISSUE IS PROPERLY BEFORE THIS COURT, AS PETITIONERS ARGUED IN THEIR PETITION FOR CERTIORARI AT 18-20, AND IN THEIR BRIEF AT 74-87, IS THE NOERR-PENNINGTON DOCTRINE APPLICABLE TO PETITIONERS?

Petitioners claim that the Noerr-Pennington doctrine immunizes their recommendations regarding bar admissions, Petitioners' Brief at 74-87.

As Petitioners noted in their Petition for Certiorari at 18, fn. 9, the Noerr-Pennington issue was raised for the first time in two amicus curiae briefs in the Ninth Circuit. By order of the Ninth Circuit, Ronwin could not either challenge the raising of the issue in that manner or res-

pond thereto, Order of the Ninth Circuit, filed July 29, 1982 (see Appendix to Ronwin's Brief in Opposition to Petition for a Writ of Certiorari, A-3, ¶'s (1) and (4)). Petitioners, themselves, first raised the issue in this Court in their Petition for Writ of Certiorari at 18-20, and Ronwin responded, "on the assumption, arguendo, that the issue is properly raised before this Court...", Ronwin's Brief in Opposition to Petition for Writ of Certiorari at 22. Notably, the Ninth Circuit decision, Ronwin, 686 F.2d at 692 totally ignored the raising of the issue by the amici and Ronwin submits that the issue is not properly before this Court. However, as this Court may hold otherwise, Ronwin hereby responds:

In advancing the purported defense of Noerr-Pennington, Petitioners raise sophistry to a new height!

Eastern Railroad Presidents Conference
v. Noerr Motor Freight, Inc., 365 U.S. 127,

81 S.Ct. 523, 5 L.Ed.2d 464 (1961) proceeds on the theme, 365 U.S. at 135:

..that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws.

Noerr drew a distinction between associations having as their purpose attempts to induce "particular action with respect to a law that would produce a restraint..," and combinations normally held violative of the Sherman Act, 365 U.S. at 136.

United Mine Workers of America v. Pennington, 381 U.S. 657, 669, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965) follows Noerr.

The fact situations in both cases are totally dissimilar to the case at bar and both cases are inapplicable to this action.

Ronwin has not challenged Petitioners' right protected by Noerr and by Pennington to make a recommendation on Ronwin's application as being violative of antitrust law; rather, Ronwin has challenged the actual,

anticompetitive grading scheme employed by Petitioners without authorization and in disregard of the policy stated in the applicable rules, Argument, §I.D., supra, whether said rules are Ronwin's version or Petitioners' version, Argument, §I.A., supra. That anticompetitive behavior is not shielded by Noerr-Pennington.

Petitioners argue, as they did in their Petition for Writ of Certiorari at 20, fn. 11, that:

Ronwin made no effort to plead that petitioners' acts fell within the 'sham' exception to Noerr-Pennington, and could not do so...,
Petitioners' Brief at 82.

One reason why Ronwin made no effort to plead the "sham" exception is that the pleading took place in the courts below and the issue was (i) not raised in the trial court but was (ii) raised for the first time in two amicus briefs in the Ninth Circuit, as Petitioners admitted, Petition for Writ of Certiorari at 18, fn.9.

As shown above at 62-63, Ronwin was not permitted to respond to said amicus briefs. For those reasons and the question of whether the issue was properly before the Ninth Circuit or this Court, Ronwin made no effort to plead the "sham" exception.

Noerr discusses the "sham" exception, 365 U.S. at 144, 81 S.Ct. at 533. In City of Kirkwood v. Union Electric Co., 671 F.2d 1173, 1181 (8 Cir. 1982), reh. den., the Court's comments are aimed at the sham exception:

The Noerr-Pennington doctrine protects the First Amendment right to petition government authorities, but later cases demonstrate that the First Amendment does not immunize all attempts to manipulate the government for anti-competitive ends. * * * Noerr protects the right to make one's views known to the government, but Cantor and Trucking Unlimited make clear that the right may not be used as a pretext to achieve otherwise unlawful results. 'If the end result is unlawful, it matters not that the means used in violation may be lawful.' Trucking Unlimited, 404 U.S. at 515, 92 S.Ct. at 614. The Noerr-Pennington doctrine will not protect a utility which manipulates the federal and state regulatory processes

to achieve anti-competitive results. It is not for expression of opinion that [Ronwin] seeks to compel [Petitioners] to respond in damages, but rather for [Petitioners] conduct in the market place.

Since Rule 28(c)VIII, Ronwin's version, 6-7, App., states that those who obtain a grade of 70 and otherwise are found qualified "...shall be recommended for admission to the Bar," and, as Petitioners' adopted seventy as the passing grade, assuming their version of the rules apply, 7-9, App., and 14,29-30, supra, Petitioners' recommendations are commanded and can hardly be classified as attempts "to influence" judicial policy.

It is also clear from Noerr that the attempts to influence which enjoy immunity are in the nature of "political" efforts.

Thus, Noerr explains, 365 U.S. at 140:

Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly

into the category of political activity.

Petitioners' "recommendations" activity hardly constitutes "political activity."

Whether or not the "sham" exception is applicable to Petitioners, Petitioners' whole attempt to clothe themselves with Noerr-Pennington doctrine immunity is a transparent sham.

III. CAN A STATE EVER USE ANY PROFESSIONAL OR OCCUPATIONAL LICENSING EXAMINATION, OR ANCILLARY PROCEDURE, FOR THE PRIMARY PURPOSE OF LIMITING THE NUMBER OF LICENSEES RATHER THAN TO DETERMINE THE INDIVIDUAL QUALIFICATIONS TO PRACTICE OF EACH APPLICANT?

Ronwin raised this question in Ronwin's Response to Petitioners' [First] "Petition for Rehearing..." submitted to the Ninth Circuit at 10-12; and, again in Ronwin's Supplemental Response to said Petition for Rehearing, at 4. Ronwin also raised the

question in his Cross-Petition for a Writ of Certiorari, at 14-16, in this Court's cause no. 82-1573, which Writ was denied.

In Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 238, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957), this Court barred exclusion from the practice of law by manners or for reasons which contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment and required that qualifications demanded of bar applicants, and presumably the standards and tests therefor, have a "rational connection with the applicant's fitness or capacity to practice law," 353 U.S. at 239, 77 S.Ct. at 756. In Greene v. McElroy, supra, 360 U.S. at 492, 79 S.Ct. at 1411, this Court declared the right to follow a chosen profession free from unreasonable governmental interference to be within the compass of the liberty and property concepts of the Fifth Amendment. The Court

eloquently reminded us of the due process principles which govern determinations of the right to pursue a profession, Greene, 360 U.S. at 496-497, 79 S.Ct. at 1413-1414. This Court explained that the right to enjoy property without unlawful deprivation, no less than the right to speak or to travel, is a "personal" right, Lynch v. Household Finance Corp., 405 U.S. 538, 552, 92 S.Ct. 1113, 1122, 31 L.Ed.2d 424 (1972), reh. den. 406 U.S. 911.

Most apropos, are the observations in Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963), which hold "admission to the bar of a state" to be a "right," 373 U.S. at 102, 83 S.Ct. at 1179.

In sum, the thrust of this Court's decisions is that the right to admission to a Bar and the right to pursue a profession flow from the personal rights to due process and equal protection under the Fifth

and Fourteenth Amendments.

Consequently, any examination for professional or vocational licensure must examine the applicant for his own abilities and not allegedly determine the applicant's abilities to practice by any scheme or procedure which, in effect, measures those abilities by their relative standing in a group or by grading on a curve.

As the Ninth Circuit noted, Ronwin had pled that the grading of the February, 1974 bar examination was such that a predetermined number of persons were passed without regard to "...achievement by each Bar applicant of a pre-set standard [of competence]," Complaint, ¶VI, J.A. 10; Ronwin, 686 F.2d at 695.

Hence, Petitioners' grading activity was more than an unauthorized, anticompetitive activity; it was an assault on the Fifth and Fourteenth Amendment rights of bar applicants to have the question of their

ability to practice law determined on the basis of their own qualifications.

It is submitted that no examination or other procedure for licensure to practice any profession or occupation, may, consonant with the Fifth and Fourteenth Amendments be of such text or design, and/or be so graded, as that anything is measured or determinative of passage of the examination, other than the individual achievement of the examinee without regard for, or contribution from, the results of any other examinee on the same or on a prior examination.

The Ninth Circuit did not directly address this issue but it is pregnant in this case. Furthermore, the right to practice a licensed profession or vocation affects substantial numbers of citizens; and, there are continual rows over licensing decisions in all fields. The issue merits this Court's attention, this Court's Rule 34.1(a).

IV. THE NINTH CIRCUIT ERRED IN AFFIRMING THE DISMISSAL OF THE SPOUSES OF THE INDIVIDUAL DEFENDANTS.

This matter was raised by Ronwin in his Cross-Petition for a Writ of Certiorari, No. 82-1573, which was denied by this Court; however, if Ronwin has stated a cause of action against Petitioners and if Ronwin prevails at trial, this issue will have significant effect on Ronwin's potential to collect damages from the Petitioners, (all of whom are married) as a consequence of Arizona's view of community property.

As the dissent noted, Ronwin, 686 F.2d 701, fn. 1, J.A. 137, in Arizona, unless a prevailing plaintiff names the spouses as co-defendants [even if such spouses took no actual, personal part in the events giving rise to the cause of action], the prevailing plaintiff is estopped from looking to the community property to satisfy the damage obligation, A.R.S., §25-215(D);

Eng v. Stein, 123 Ariz. 343, 599 P.2d 796, 799 (1979). Ronwin pled that the Petitioners acted on behalf of their respective marital communities, J.A. 8, and thereby named the spouses, J.A. 5-6. Whether Petitioners acted on behalf of their communities is a fact question, Howe v. Haught, 11 Ariz. App. 98, 462 P.2d 395, 397 (1970). The Ninth Circuit had no basis in the record for determining that fact question; and, as above, Ronwin's allegation of community involvement was sufficient to require the spouses to remain joined. Nevertheless, the Ninth Circuit dismissed the spouses on the grounds that "no specific wrongdoing" was alleged against them, Ronwin, 686 F.2d at 694, fn. 1.

The judgment of the Ninth Circuit carries the force of law. Does said judgment mean with respect to the dismissal of the spouses that, as with the Act of Congress involved in Wissner v. Wissner, 338 U.S. 655, 70 S.

Ct. 398, 94 L.Ed. 424 (1950) and as with the Treasury regulations involved in Free v. Bland, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962), the community property laws of Arizona, in particular A.R.S. § 25-215(D), do not hold as to federal practice in Arizona and do not require joinder of spouses as co-defendants in federal suits in order to reach a defendant's share of his or her community property? If not, then, there was no basis for the Ninth Circuit's affirmance of the dismissal of the spouses and said action should be reversed.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision should be affirmed and the Ninth Circuit's dismissal of the spouses should be reversed. The Feldman case should be overruled. Use of any examination for professional or occupa-

tional licensing which by grading or by text or otherwise does not measure individual abilities to practice should be declared an unconstitutional activity. The Midcal test, with an added prong requiring the sovereign to explain its compelling need to adopt an anticompetitive measure, should be declared the test for state-action exemption applicable to official or private parties.

Respectfully submitted,

Edward Ronwin
P.O. Box 3585
Urbandale, Iowa 50322
(515) 223-8819
Respondent pro se

(Appendices follow)

APPENDIX

STATUTORY PROVISIONS AND RULES INVOLVED
(Additional to and amplifying those found
in Petitioners' Brief on the Merits)

UNITED STATES CONSTITUTION:Fifth Amendment

No person shall...be deprived of life,
liberty, or property, without due process
of law...

Fourteenth Amendment

..No State shall make or enforce any
law which shall abridge the privileges or
immunities of citizens of the United States;
nor shall any State deprive any person of
life, liberty, or property, without due
process of law; nor deny to any person
within its jurisdiction the equal protec-
tion of the laws.

UNITED STATES STATUTES:

15 U.S.C. §1. Trusts, etc., in restraint
of trade illegal; (as in effect prior to
December 21, 1974).

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *

Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c.647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c.281, 69 Stat.282.

And, as amended December 21, 1974, Pub.L. 93-528 §3, 88 Stat.1708: (The December 12, 1975 amendment, Pub. L. 94-145 §2, 89 Stat.801, deleted the anti-trust exemption to State

Fair trade laws which are deleted from the above text).

§1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the Several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

ARIZONA REVISED STATUTES:

§12-109. Promulgation of rules of pleading, practice and procedure; distribution

A. The supreme court, by rules promulgated from time to time, shall regulate pleading, practice and procedure in judicial proceedings in all courts of the state for the purpose of simplifying such pleading, practice and procedure and promoting speedy determination of litigation upon its merits. The rules shall not abridge, enlarge or modify substantive rights of a litigant.

B. The supreme court shall print and distribute the rules to all members of the state bar and to all other persons who apply.

C. The rules shall not become effective until sixty days after distribution.

Source: Laws 1939, Ch.8, §3
Code 1939, §19-204

§12-111. Statutes as rules of court

All statutes relating to pleading, practice and procedure shall be deemed rules of court and shall remain in effect as such until modified or suspended by rules promulgated by the supreme court.

Source: Laws 1939, Ch.8 §3.
Code 1939, §19-204.

ARIZONA SUPREME COURT RULES:

(All in Volume 17A, Arizona Revised Statutes)

(Rules as contended by Ronwin to have been in effect during the February, 1974 bar examination)

Rule 28. Examination and Admission

28(a) Committee on examinations and admissions; powers and duties. The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purpose, a committee on examinations and admissions consisting of seven active members of the state bar shall be appointed by this court.

* * *

The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of govern-

ors as approved by this court respecting examinations and admissions * * *

The court will then consider the recommendations and either grant or deny admission. Amended, effective Sept. 15, 1970.

Rule 28(c)VII

Examinations will be upon the following subjects: Contracts, Torts, Criminal Law, Equity, Agency-Partnership, Wills and Administration, Professional Responsibilities, Pleading and Procedure, Constitutional Law, Evidence, Private Corporations (including State and Federal regulations regarding issuance and sale of corporate stock), Property (including Real and Personal Property, Community Property Laws and the Uniform Commercial Code in relation to property law), Trusts, Federal Income Tax, Conflict of Laws.

Rule 28(c)VIII

The semi-annual examinations in February and July shall be in writing. All applicants who receive a grade of seventy or more in

the general examination (all subjects except professional ethics) and who receive a grade of seventy or more in professional ethics and who are found to be otherwise qualified under these rules shall be recommended for admission to the Bar. (Adopted April 1, 1967; amended effective Aug. 1, 1970).

(Rules as contended by Petitioners to have been in effect during the February, 1974 bar examination. The following version of the rules are dated January 11, 1974 and allegedly made effective January 15, 1974; see Argument, §I.A, supra. A certified copy of the order containing this version of the rules is attached to Petitioners' (First) "Petition for Rehearing..." filed in the Ninth Circuit phase of the case).

Rule 28(a). The text is identical to that in Ronwin's version, 5-6, App.

Rule 28(c)VII

A. Examinations will be upon the following subjects:

* * *

(deleted portion identical to the text in Ronwin's version, 6, App.)

The Committee may utilize the Multi-State Bar Examination sponsored by the National Conference of Bar Examiners and may utilize such grading and scoring system as the Committee deems appropriate in its discretion.

B. The Committee on Examinations and Admissions will file with the Supreme Court thirty (30) days before each examination the formula upon which the Multi-State Bar Examination results will be applied with the other portions of the total examination results. In addition the Committee will file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination.

Rule 28(c)VIII

A. The semi-annual examinations shall not be oral. All applicants who receive a passing grade in the general examination

(all subjects except Professional Responsibilities) and who also receive a passing grade in Professional Responsibilities and who are found to be otherwise qualified under these Rules shall be recommended for admission to the Bar.

IN THE SUPREME COURT OF THE STATE OF
ARIZONA

ORDER ADOPTING AND PROMULGATING RULES OF
THE SUPREME COURT OF THE STATE OF ARIZONA

Pursuant to Laws 1939, Chapter 8, §§1, 2,
3(19-202 through 19-204, Arizona Code Anno-
tated 1939), IT IS ORDERED:

1. That the Rules of the Supreme Court of the State of Arizona hereto annexed be and they are hereby adopted and promulgated as Rules of the Supreme Court of the State of Arizona.

2. That the Rules hereby adopted and promulgated shall take effect and be in force on and after twelve o'clock midnight December 31, 1955.

3. That a copy of the annexed Rules shall be distributed to all members of the State Bar of Arizona, and to all persons who apply therefor, not later than sixty days before such Rules become effective and in force.

DATED AND ENTERED at the City of Phoenix, the Capitol of the State of Arizona, this 18th day of June, 1955.

/s/ Arthur T. La Prade
Chief Justice

/s/ Levi S. Udall
Judge

(SEAL) /s/ Dudley S. Windes
Judge

/s/ M.T. Phelps
Judge

/s/ Fred C. Struckmeyer, Jr.
Judge

Attest:

/s/ Eugenia Davis
Clerk

(Copy of above appears at p.2, Vol 17A, Arizona Revised Statutes and on p. 464 of the soft-bound "pamphlet" labelled "Arizona Rules of Court", 1982 version of the rules;

said "pamphlet" accompanies and is part of the complete set of the Arizona Revised Statutes which is the official publication of same).

Passing Percentage Results for the Arizona State Bar Examinations from 1973-1976, inclusive. Taken from National Bar Examination Digest, supra, at 14:

	<u>1976</u>	<u>1975</u>	<u>1974</u>	<u>1973</u>
Winter	70	76	54	70
Summer	58	76	76	83

If "equalization" occurred, rather than use of the examination for anti-competitive purposes in February, 1974, then the results would read:

	<u>1976</u>	<u>1975</u>	<u>1974</u>	<u>1973</u>
Winter	70	76	75*	70
Summer	75*	76	76	83

*- average obtained by deleting the 54% in Winter, 1974 and the 58% in Summer, 1976.

Comparison of the Passing Percentage Results on the bar examinations of the States of California, Utah, Texas and New Mexico for the years, 1973 to 1979, inclusive:

CALIFORNIA

	<u>'79</u>	<u>'78</u>	<u>'77</u>	<u>'76</u>	<u>'75</u>	<u>'74</u>	<u>'73</u>	<u>Av.</u>
Winter	44	38	44	37	43	51	50)	
							)	50.21%
Summer	52	52	55	59	61	62	55)	

UTAH

Winter	94	85	87	--	83	94	96)	
							)	91.67%
Summer	89	93	93	--	94	94	98)	

TEXAS

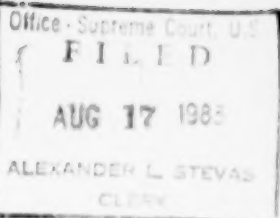
Winter	86	87	86	90	89	87	90)	
)	
Summer	85	90	86	79	91	90	93)	87.76%
)	
Fall					90	86	87)	

NEW MEXICO

Winter	71	62	70	79	70	79	70)	
							)	71.71%
Summer	83	67	69	66	67	76	75)	

Data taken from: For years 1973-1976, National Bar Examination Digest, supra, pp. 15,36,43,44. For years 1977-1979, BAR/BRI Digest, supra, pp. 7,26,35,36.

NO. 82-1474



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN,
ROBERT D. MYERS and HAROLD J. WOLFINGER,

Petitioners,

vs.

EDWARD RONWIN,

Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS STATE BAR OF ARIZONA,
JAMES L. RICHMOND, GEORGE READ CARLOCK,
and D. THOMPSON SLUTES

Philip E. von Ammon
(Counsel of Record)
Timothy J. Burke
FENNEMORE, CRAIG, von AMMON,
UDALL & POWERS
1700 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003
(602) 257-8700
Counsel for Respondents State
Bar of Arizona, James L.
Richmond, George Read Carlock,
and D. Thompson Slutes

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(Counsel of Record)
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FENNEMORE, CRAIG, von AMMON,
UDALL & POWERS
1700 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003
(602) 257-8700
Counsel for Respondents State
Bar of Arizona, James L.
Richmond, George Read Carlock,
and D. Thompson Slutes

For their brief on the merits in this action, Respondents State Bar of Arizona, James L. Richmond, George Read Carlock and D. Thompson Slutes adopt in its entirety the brief on the merits of Petitioners Hoover, Karman, Myers, and Wolfinger. The decision of the Ninth Circuit should be reversed for the reasons and to the extent set forth in Petitioners' Brief.

State Bar of Arizona, James L. Richmond, George Read Carlock, and D. Thompson Slutes, although defendants below, file this Brief as Respondents pursuant to Rule 19.6, Rules of the Supreme Court of the United States.

RESPECTFULLY SUBMITTED this 15th day of August, 1983.

Philip E. von Ammon
(Counsel of Record)
Timothy J. Burke
FENNEMORE, CRAIG, von AMMON,
UDALL & POWERS
1700 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003
(602) 257-8700

By Philip E. von Ammon
Philip E. von Ammon
Counsel for Respondents
State Bar of Arizona,
James L. Richmond, George Read
Carlock, and D. Thompson Slutes

CERTIFICATE OF SERVICE

Three copies of the foregoing Brief of Respondents State Bar of Arizona, James L. Richmond, George Read Carlock and D. Thompson Slutes were served by hand-delivery on August 15, 1983, to:

Charles R. Hoover
Donn G. Kessler
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Attorneys and Counsel of Record for Petitioners

Three copies of the foregoing were deposited in a United States mail box, with first class postage prepaid, addressed to:

Edward Ronwin
P.O. Box 3585
Urbandale, Iowa 50322
Respondent In Propria Persona

These counsel represent all parties to this action required to be served.

Philip E. von Ammon
(Counsel of Record)
Timothy J. Burke
FENNEMORE, CRAIG, von AMMON,
UDALL & POWERS
1700 First Interstate Bank Plaza
100 West Washington
Phoenix, Arizona 85003
(602) 257-8700

By Philip E. von Ammon
Philip E. von Ammon

Counsel for Respondents
State Bar of Arizona,
James L. Richmond, George Read
Carlock, and D. Thompson Slutes

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JAN 5 1984

ALEXANDER L. STEVAS,
CLERK

No. 82-1474

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN
ROBERT D. MYERS and HAROLD J. WOLFINGER
Petitioners,
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EDWARD RONWIN,
Respondent,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE PETITIONERS

CHARLES R. HOOVER
111 West Monroe
Phoenix, Arizona 85003
(602) 262-5911
Petitioner in Propria
Persona, and Counsel for
the Remaining Petitioners

JEFFERSON L. LANKFORD
DONN G. KESSLER
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
(602) 262-5911
Of Counsel

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SUMMARY OF ARGUMENT

None of the parties or amici support the holding of the Court of Appeals that California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) limits officials' immunity to conduct (1) pursuant to a specific, clearly articulated and affirmatively expressed state policy compelling the challenged conduct and (2) actively supervised by the State. Ronwin and the amici supporting him each propose a test for state officials stricter than the Midcal test for private persons.

Ronwin argues that only one state action test exists for both state officials and private persons. He argues that the Arizona Supreme Court

was required to give prior and explicit approval of "the detailed substance" of the challenged conduct. (Brief at 61).

The amici curiae States reject the Midcal test for state officials. While conceding that officials need not be actively supervised (Brief at 13-14, n. 10), they argue that the specific conduct must be either "clearly necessary to effect" state policy or "'clearly articulated and affirmatively expressed' in the ... state policy." (Id. at 11-13).

The United States also rejects the active supervision requirement, but argues that conduct is immune only if it is "in furtherance" of a clearly articulated state policy. (Brief at 8, 11). The United States believes that federal judges must examine the reasonableness and purpose of

regulatory conduct to decide if it is state action.

The Examiners believe that, as state officials, they are not subject to such stringent tests. The federalism principle underlying the state action doctrine prohibits unintended, needless interference with the States' traditional regulatory role. Even so, the Examiners' conduct is direct action by the State which satisfies the most demanding state action test. The dismissal of the complaint was also correct under Noerr-Pennington, res judicata and jurisdictional principles.

ARGUMENT

I. THE GRADING OF BAR EXAMINATIONS BY STATE OFFICIALS IS "STATE ACTION."

A. Grading examinations is immune as state regulatory activity.

The Examiners believe that governmental acts by state officials

are exempt from federal antitrust liability. Their immunity flows directly from Parker v. Brown, 317 U.S. 341 (1943). Parker holds that federal antitrust law does not proscribe state regulatory acts even though they are anticompetitive. The Examiners are exempt because their conduct, like the establishment of raisin quotas by the commission members in Parker, is direct action by the state itself. Since the complaint establishes the official nature of the challenged action, the complaint was properly dismissed. (See Complaint, ¶'s 2, 3, 5 at J.A. 7-9)

Ronwin alone contends that the Examiners are not state officials. Yet Ronwin's complaint identifies the Examiners as members of an Arizona Supreme Court committee exercising that Court's power to regulate bar

admissions. (J.A. 7-8, ¶2). This allegation establishes that the Examiners are state officials.^{1/}

The Examiners' official status does not conclude the state action inquiry, but it does establish the starting point. "[N]othing in the ... Sherman Act ... suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." Parker, 317 U.S. at 350-351 (emphasis added).^{1/} State officials are

^{1/} See Bates v. State Bar of Arizona, 433 U.S. 350, 361 (1977) (State Bar acted as agent of Arizona Supreme Court in enforcing court rules governing lawyers, and therefore claims against it are "claims against the state").

^{1/} The fact that the challenged acts were performed by the Arizona Supreme Court's Committee on Examinations rather than the Court itself does not alter the analysis. The grading of bar examinations by the (Continued on next page)

subject to less demanding requirements for antitrust immunity than are private persons, a distinction which has been recognized repeatedly by this court. Bates, 433 U.S. at 361; Community Communications Co. v. City of Boulder, Colo., 455 U.S. 40, 52 (1982); New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 110 (1978). Boulder confirms the difference between the Examiners' direct state action and the indirect implementation of state policy through municipal action:

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 Committee is just as immune as the Commission's establishment of raisin quotas held to be action of the State "acting through the Commission" in Parker v. Brown, 317 U.S. at 352.

In fact, the Arizona Supreme Court actually decided Ronwin's application. The real but unnamed defendant in this action is the Arizona Supreme Court. See Bates, 433 U.S. at 361 (State is real defendant in claim against State Bar).

Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see Parker, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see City of Lafayette, Orrin W. Fox Co., and Midcal.

Boulder, 455 U.S. at 52 (emphasis added).^{1/}

A different test for state action therefore applies to state officials.

^{1/} As part of the State itself, the Committee on Examinations is entitled to the "federal deference" denied to cities. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978). The Examiners are not equivalent to political subdivisions of the state "with substantially less than statewide jurisdiction" pursuing their own purely "parochial interests." Id. at 413, 414, 416. Rather, the Supreme Court's Committee on Examinations is an integral part of that Court, exercising the Court's power, and pursuing important policies of statewide concern.

"[W]here there is no question that the challenged conduct is committed by the state itself," the tests for cities and private persons are not used because they are not needed to assure that the conduct is truly state action. Ajax Aluminum, Inc. v. Goodwill Industries, 564 F.Supp. 628, 632 (W.D. Mich. 1983). The Examiners are engaged in direct action by the State as an arm of the Arizona Supreme Court.

The federal courts do not need to examine the officials' conduct to see if it is sufficiently related to the State's policy. Ronwin alleged that the Examiners are state officials engaged in regulating bar admissions. Rule 28 shows that the Examiners regulated pursuant to authority delegated by the Arizona Supreme Court. Regulatory actions by ~~state~~

officials in pursuit of state policy are immune. It is not necessary for the officials to prove that their conduct is "reasonable," necessary," or that the anticompetitive consequences of their actions are minimized, as Ronwin and the amici States and United States propose. If the officials have engaged in misconduct, then state mandamus relief and judicial review stand ready to correct their abuses. But federal antitrust law is not an appropriate means of keeping the conduct of state officials within the bounds of state law.

Arizona's bar examiners are entitled to the same deference as the California officials in Parker. Grading bar examinations is exempt from antitrust law as state action.

B. The grading of bar examinations is contemplated by Arizona's clearly articulated policy of restricting entry into the legal services market.

The Examiners believe that they also satisfy the state action test for cities set forth in Lafayette and Boulder because Arizona clearly articulated an affirmative policy to supplant competition with regulation and Arizona's regulatory policy contemplated administering bar examinations.

The principal dispute here is whether the Examiners must also show either that the policymaker approved the details of the regulatory action or that the scoring method was "reasonable," "necessary" or limited to the minimum needed to effect the state policy.

1. The State's policy need not be detailed.

The State policymaker need not express its regulatory policy or methods in detail to prove that regulatory acts are state action. This Court stated the correct test in Lafayette:

This does not mean, however, that a political subdivision must be able to point to a specific detailed legislative authorization ... [A]n adequate state mandate ... exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

435 U.S. at 415 (quoting opinion of Court of Appeals in Lafayette).

Parker v. Brown supports this proposition. The specific raising quotas set by the defendant commission members were not approved by the California Legislature. The

legislature had simply authorized the commission to establish a program pursuant to the general state policy "to 'conserve the agricultural wealth of the state' and to 'prevent economic waste in the marketing of agricultural crops' of the state." 317 U.S. at 346 (quoting statute).

Similarly, the particular scale for scoring the bar examinations did not have to be specified by the Arizona Supreme Court. It was enough for that Court to have directed that the Examiners devise and administer an examination.^{1/}

^{1/}The amici States assert that Boulder requires that the clearly articulated standard be "strictly applied." (Brief at 15). Boulder held only that neutral state statutes expressed no state regulatory policy. 455 U.S. at 55.

2. The Examiners' actions were contemplated by the Arizona Supreme Court as a means of executing the policy of regulating the legal services market.

The Examiners' conduct need only be of the type "contemplated" by the State's policymaker. This is the test applied in Boulder and Lafayette.

The Examiners' conduct satisfies this test. Administering and grading bar examinations is clearly contemplated within Arizona's policy of regulating legal services. Arizona has a comprehensive system of such regulation.^{1/} The existence of

^{1/}The practice of law in Arizona is highly restricted both by statute and by judicial rules. Among the regulations are barriers to market entry: an applicant must pass an examination and demonstrate satisfactory character and fitness. Rule 28. Once admitted to practice, a lawyer's conduct is regulated in detail. E.g., A.R.S. §§ 32-263, 32-266, 32-267; 32-273; Rule 29, Rules of the Arizona Supreme Court.

such "a system of regulation, clearly articulated and affirmatively expressed, designed to replace unfettered business freedom" demonstrates the State's regulatory policy. Fox, 439 U.S. at 109.

Grading the bar examination results is certainly contemplated as a method of implementing the state's policy. In fact, the Arizona Supreme Court specifically directed the Examiners to devise and score an examination.^{1/} The Examiners

^{1/}Ronwin contends that a different version of Rule 28 was in effect when he took the bar examination in February and March 1974. The Supreme Court of Arizona amended Rule 28 in January of 1974 to delete a reference to "a grade of seventy or more in the general examination" and substitute the following: "The Committee may utilize the Multistate Bar Examination ... and may utilize such grading or scoring system as the Committee deems appropriate in its discretion." The (continued on next page)

did just that. Unless the Arizona Supreme Court were to devise, grade and score the examinations itself, more explicit state authority for the Examiners' actions is inconceivable.

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 amendment was made effective on January 15, 1974. The amended rule and its effective date are found at 110 Ariz. XXVII, XXXII. Ronwin argues that the amendment was not in effect for the February 1974 examination because A.R.S. § 12-109 provides that "the rules shall not become effective until sixty days after distribution." (Brief at 11, emphasis supplied by Ronwin). This statute, however, applies only to rules of "pleading practice and procedure in judicial proceedings." A.R.S. § 12-109(A). Moreover, the Arizona Supreme Court has inherent and constitutional power to govern admissions, to promulgate court rules and to make rules effective immediately. Ariz. Podiatry Ass'n v. Director of Insurance, 101 Ariz. 544, 422 P.2d 108 (1966); Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1964); In re Collins, 108 Ariz. 310, 497 P.2d 523 (1972).
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C. More stringent scrutiny of state action would undermine federalism.

Ronwin and his supporting amici propose that the state policy must expressly approve the details of the challenged conduct or that the specific conduct must be necessary, reasonable or "in furtherance" of state policy. (Ronwin's Brief at 60; States' Brief at 15, 20; Brief of United States at 11, 17, 28).

The argument that the scoring method may not limit admissions any

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Moreover, Ronwin's belief that former Rule 28 required a "preset" score of "70" (Brief at 28, 39) is not supported by the text of the rule. Ronwin also incorrectly states that the Examiners' answer admitted that there was a "pre-set" standard of "70." (Brief at 30; Complaint, ¶¶ 3, 6 at J.A. 9-10; Answer, ¶¶ 3, 5 at J.A. 17-18).

more than necessary to assure competence is a type of "less drastic means" test already rejected by this Court. In Bates, the claimants argued that "the advertising ban is not tailored so as to intrude upon the federal interest to the minimum extent necessary." 433 U.S. at 361. This Court correctly rejected that argument. Such a strict test for state action defeats the very purpose of the doctrine: to leave the States' pursuit of their own policy goals unfettered by the threat of federal antitrust liability.

Moreover, the United States does not define its proposed "in furtherance" test. If this is simply the "contemplated" test restated, then the Examiners meet it. If the test is one of "reasonableness," then the United States offers an unworkably

vague standard. If the test searches for state authorization of the challenged action, Rule 28 provided ample authority for the Examiners to administer and grade the examination.

The proposed new tests also rely on whether the Examiners acted for a "proper" purpose or an "anticompetitive purpose." (Ronwin's Brief at 31; Brief of United States at 7-8; States' Brief at 8, 16-18). This inquiry into the motive of state officials was emphatically rejected by this Court in Lafayette. 435 U.S. at 411, n. 41.^{1'}

^{1'}Moreover, if determinations of motive or purpose are needed to apply the state action exemption, then summary judgment would be entered only rarely in favor of the state officials. See Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962) (summary judgment should be granted only rarely in antitrust case where intent is at issue). The (continued on next page)

The problem with such inquiries into purpose, reasonableness and necessity is that they thus undermine federalism. We are told, for example, that federal courts should decide "the adequacy of the delegation [of authority by the State], and agency compliance with it." (Brief of United States at 14). These are matters of the States' own governmental operations, however, which must be left to them if they are to retain any sovereignty.

If regulatory acts can be attacked as "unreasonable" or "unnecessary,"

(continued from previous page)
assertion of the United States that dismissal may be refused because summary judgment is easily obtained (Brief at 26) is thus inconsistent with its own argument that the defendants' purpose must be examined.

then every "routine governmental act will be subject to antitrust scrutiny." P. Areeda, "Antitrust Immunity for 'State Action' After Lafayette," 95 Harv. L. Rev. 435, 450 (1981). The conduct challenged in Parker v. Brown would not have survived such close scrutiny. The California legislature did not expressly approve the raisin quotas. Nor could it have proved that the quotas did not restrict competition any more than necessary to meet the State's goals. It can always be argued that the anticompetitive effects of the state regulation are too great. The whole point of the state action doctrine, however, is to exempt state action despite its anticompetitive effect.

Equally inimical to federalism are the proposals that the state

policymaker must expressly approve the specific actions being challenged. Such a rule would prevent any delegation of authority within state governments. How can state governments function if state legislatures and supreme courts are forbidden to delegate and must approve countless regulatory details?

Federal antitrust law does not undertake to restrain action by a state or its officials. Parker v. Brown, 317 U.S. at 350-352.^{1/} This Court has noted that state regulation

^{1/}The authorities cited in support of strict new state action tests do not in fact support them. For example, the United States cites Boulder and Lafayette as requiring that the challenged conduct be "in furtherance" of a specific state policy. (Brief at 11, 17 and note 17). Actually, this Court applied the "contemplated" test in those cases. Lafayette, 435 U.S. at 415; Boulder, 455 U.S. at 55. The lower court cases cited by the United States also support the "contemplated" test of (Continued on next page)

of the bar "is at the core of the State's power to protect the public," Bates, 433 U.S. at 361, and that "we intend no diminution of the authority of the state to regulate its professions." Goldfarb v. Virginia State Bar, 421 U.S. 773, 793 (1975). The proposed new tests would have just such an untoward effect.

D. The Examiners satisfy even the proposed new tests for state action immunity.

The Examiners' actions in scoring the examinations were specifically contemplated by the Arizona Supreme Court as part of its policy to employ a bar examination as a barrier to

(Continued from previous page)
Lafayette. See cases cited in Brief of United States at 11; see also Campbell v. City of Phoenix, 1983-2 CCH Trade Cas. ¶ 65,753 (D. Ariz. Nov. 21, 1983) (rejecting a proposed "in furtherance" test); First American Title Co. v. S. Dakota Land Title Assn., 714 F.2d 1439 (8th Cir. 1983) (applying contemplated test to political subdivision.)

market entry in legal services. That Court's Rule 28 explicitly directs the Examiners to devise and grade an examination, and Ronwin's complaint does not contend that the Examiners did anything else.

The Examiners' conduct also was both "reasonable" and "necessary" to achieve state policy. *Amici curiae* argue that limiting the number of passing applicants is not necessary to assure lawyer competence. (States' Brief at 20; Brief of United States at 17). Even if the State's policy were solely competence, the argument fails because it rests on a misunderstanding of the grading process. Ronwin's complaint alleges that he was first given a raw score -- i.e., one which counted the number of correct answers -- and that his raw score was converted to a zero to 100 scale with

70 as the passing score. He claims that this method of scoring "artificially" restricted admission to the bar and thereby reduced the numbers of Arizona lawyers. (J.A. 10-11).

The grading system which Ronwin describes is called "scaled scoring."^{1/} Raw scores alone are meaningless because they reflect only the number of correct answers.^{10/} For example, a mathematician might have no correct

^{1/}Ronwin sometimes refers to a "raw-score system" but his complaint describes a scaled score: "A scaled score is the score on a test when the raw score obtained has been converted to a number on a standard reference scale." "Equating to Obtain Scaled Scores for the Multistate Bar Examination," in S. Duhl (ed.), The Bar Examiners' Handbook 65, n.1 (2d ed. 1980).

^{10/}W. Angoff, "Scales, Norms and Equivalent Scores" in R. Thorndike (ed.), Educational Measurement 533 (2d ed. 1971).

answers if the examination questions were sufficiently difficult. The mathematician's zero raw score would not reflect zero competence in mathematics.

Raw scores therefore must be compared to some standard of ability. The standard is ordinarily based on the test performance of others. The standard is incorporated into a grading scale to facilitate the comparison.

Testing inherently results in limiting the number of "successful" examinees. The whole point of a test is to select those who perform relatively well. Ronwin correctly observes: "[T]he very act of choosing a raw score as equal to 70 is automatically and inseparably hinged to a determination of the number of admitted examinees." (Brief at 55-56).

The fact that the scoring scale determines how many examiners pass signifies nothing sinister, however; it is an inescapable result of standardized testing.

Ronwin's thesis is that the Examiners' scoring method failed more applicants than needed to assure competence. That theory makes every examination grade vulnerable to an antitrust attack, for the decision of how many applicants will pass is always vulnerable to second-guessing. No matter what the contents of the examination and the method of scoring, someone must draw the inevitably inexact line between a passing score and a failing score.¹¹ Federal

¹¹ It is possible to use a raw score if the examiner uses supplementary interpretive data; this is merely a more cumbersome version of scaled scoring. There is only one way (continued on next page)

district judges are no better able to set the passing score and determine legal competence than a state supreme court and its bar examiners.

E. Although State officials need not be "actively supervised," the Examiners were actively supervised by the Arizona Supreme Court.

1. Midcal's active supervision requirement does not apply to state officials.

Since the Examiners meet the "clearly articulated" standard, the

(continued from previous page)
to use the "preset" raw score Ronwin suggests: the test is of such difficulty that a barely competent person receives exactly a passing score. S. Tinkelman, "Planning the Objective Test," in Thorndike, supra at 67. Even if such a test could be devised, the examiner must still choose the minimum level of test performance which he believes demonstrates "competence." That decision is no more precise or objective when implemented by adjusting test difficulty than by adjusting the scoring scale. An examination using Ronwin's "pre-set" score is therefore equally vulnerable to an antitrust challenge.

only remaining question is whether Midcal's "active supervision" requirement applies to state officials as well as to private persons. Antitrust claims against state officials pose "an entirely different case" than claims against private parties, however. Bates, 433 U.S. at 361. Neither state officials nor cities have been required to be actively supervised. Parker v. Brown, supra; Fox, supra; Lafayette, supra; Boulder, 455 U.S. at 51-52, n. 14 (reserving the question). The Court of Appeals conceded that the Examiners are state officials, and incorrectly required that they be actively supervised as if they were not officials.

Ronwin alone supports the use of the active supervision test in this case. Ronwin argues that "active

supervision" means that the state policymaker must approve the particular conduct in advance. (Brief at 61). By Ronwin's thinking, the Parker Court should have required that the California Legislature have "precleared" every raisin quota adopted by the commission.

The Examiners' arguments against an active supervision requirement stand unchallenged, however. (See Examiners' Brief at 46-54). Active supervision would eliminate necessary delegation of state authority to individual officials. Supervision by the usual methods of state legislative oversight, judicial review and mandamus ensure that state officials act within the bounds of their authority. Any contrary conclusion indicts the ability of the States to keep their own houses in order, and

thus indicts the viability of our federal system of government.

2. Even if active supervision is required, the Examiners were actively supervised by the Arizona Supreme Court.

Neither Ronwin nor the amici curiae who support him deny that the Examiners are actively supervised by the Arizona Supreme Court. (See Examiners' Brief at 70-73). That Court reviews individual examinations by petition of the applicant. Even if the Examiners are subjected to the more stringent test applicable to private persons, then, they are still entitled to antitrust immunity.

II. IN PETITIONING THE ARIZONA SUPREME COURT, THE EXAMINERS ARE IMMUNE UNDER THE "NOERR-PENNINGTON" DOCTRINE.

Ronwin and his supporting amici premise their antitrust challenge on the assumption that Petitioners were acting in a "private" capacity. This

assumption is unwarranted and contradicts Ronwin's own allegations that Petitioners acted as a Committee of the Arizona Supreme Court. Even if Petitioners were acting as private persons, however, they are immune under the Noerr-Pennington doctrine.

Petitioners recommended action by the Arizona Supreme Court on Ronwin's application. This conduct is immune as an attempt to influence governmental action.

Neither Ronwin nor any of his supporting amici dispute the above facts.^{12/} Instead, they argue

^{12/}The United States contends in its Brief (at 30-31, n. 36) that the recommendation of the Examiners is "effectively final." This assertion is made without any authority; the United States elsewhere cites cases wherein the Arizona Supreme Court overruled Petitioners' recommendations. Id. at 19, n. 21.

that: (1) Noerr-Pennington immunity was not effectively raised before the Ninth Circuit; (2) the grading process, not the recommendation, is being challenged; (3) the Noerr doctrine protects only "political activity"; and (4) the recommendation may fall within the "sham exception" to the doctrine. (Ronwin's Brief at 64-68; United States' Brief at 30-31, n. 36.) None of these arguments defeats the Petitioners' immunity.

First, Noerr immunity is not being raised for the first time in this Court. The issue was raised in the Court of Appeals by amici curiae and in the Examiners' Petition for Certiorari.^{11/}

^{11/}It is also settled that an appellate court should affirm a lower court if the result below was right for the wrong reason. E.g., Helvering (continued on next page)

Second, it matters not that Ronwin claims to be attacking the grading and not the recommendation. The decisive fact is that the Arizona Supreme Court denied Ronwin's admission and caused his alleged injury. "Where a restraint upon trade ... is the result of valid governmental action ... no violation of the Act can be made out." Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961).

Third, the Noerr-Pennington doctrine is not limited to "political activity." See United Mine Workers of America v. Pennington, 381 U.S. 657

(continued from previous page)
v. Gowran, 302 U.S. 238, 245 (1937);
Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971) (state action immunity decided on appeal though not raised below).

(1965) (executive action); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (judicial proceedings).^{14'}

Finally, the United States argues that the Examiners' conduct may fall within the "sham" exception. (Brief at 30-31, n. 36). That exception is not applicable here, however, because Ronwin did not and could not plead sufficient facts to come within the exception (See Examiners' Brief at

^{14'}In addition, the United States argues that Noerr-Pennington should not apply to governmental agencies petitioning courts. (Brief at 30-31, n. 36.) The Examiners' Noerr-Pennington argument assumes, however, that the argument of the United States has succeeded in proving that the Examiners are private persons and not officials. If the Examiners are officials exercising state power, they do not need Noerr-Pennington immunity because the state action doctrine protects them.

82-84) and because Petitioners have not barred Ronwin from access to the courts. (Id. at 85-86.)^{15/}

III. RONWIN'S COMPLAINT WAS PROPERLY DISMISSED BECAUSE THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION AND BECAUSE THE COMPLAINT IS BARRED BY RES JUDICATA.

The district court's dismissal of Ronwin's complaint was also required under the principle set forth in District of Columbia Court of Appeals

^{15/}Even if frivolous litigation were within the sham exception, it should be limited to repeated frivolous suits. Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973). Ronwin, having repeatedly and unsuccessfully sought judicial relief, shows that the Examiners' position has not been frivolous. Examiners' Brief at 86-87. The history of Ronwin's litigation regarding the Arizona bar appears in In the Matter of Ronwin, ___ Ariz. ___, 667 P.2d 1281, cert. denied sub nom. Ronwin v. Supreme Court of Arizona, ___ U.S. ___, 104 S.Ct. 413 (1983).

v. Feldman, ____ U.S. ____, 103 S.Ct. 1303 (1983) and res judicata.

The jurisdictional defect noted by this Court in Feldman, supra, should be applied to antitrust cases challenging bar examinations.^{16/} In that case, this Court held that district courts lacked jurisdiction

^{16/}Ronwin asserts that this issue may have been waived by not being included in the Examiners' Brief.

This Court can consider issues supporting a judgment even if it is not encompassed by the petition for certiorari, United States v. New York Tel. Co., 434 U.S. 159, 166, n. 8 (1977), and even if not raised below. Fox, 439 U.S. at 109. n. 13. Consideration of these issues presents no difficulty because there are no disputed facts relating to the prior judicial proceedings which bar Ronwin's complaint. Fox, supra. Moreover, Ronwin is not prejudiced because he has had a chance to brief these issues before this Court. Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263 (1960).

over constitutional challenges to denials of individual bar applications by the highest court of a state and that any further challenge had to be made to this Court. Ronwin made that challenge when he unsuccessfully petitioned for certiorari in Ronwin v. Committee on Examinations and Admissions of the Supreme Court of Arizona, 419 U.S. 967 (1974). The district court's dismissal of the complaint therefore should be sustained for lack of jurisdiction.

In order to avoid this jurisdictional problem, Ronwin argues that his complaint is not a challenge to an individual failing grade, but to a method of grading the entire examination. This ignores the very language of Feldman: such general challenges are barred when they are inherently "intertwined" with a

challenge of an individual failing grade. Feldman, 103 S.Ct. at 1317.

Ronwin's complaint is also barred by res judicata.^{17/} Res judicata precludes relitigation of issues that were or could have been raised in a previous proceeding concluded by a final judgment on the merits. Allen v. McCurry, 449 U.S. 90 (1980); Kremer v. Chemical Const. Corp., 456 U.S. 461 (1983). Res judicata requires a final decision on the merits, and an identity of causes of action and of parties or their privies. Nash County Board of Education v. Biltmore Co.,

^{17/}This issue may be decided on appeal because the facts supporting invocation of res judicata are undisputed and a remand would be meaningless. Southard v. Southard, 305 F.2d 730 (2d Cir. 1962); see also Fox, 439 U.S. at 109, n. 13.

640 F.2d 484 (4th Cir.), cert. denied,
454 U.S. 878 (1981).

Ronwin raised his antitrust challenge to the grading system once before in his petition for review to the Arizona Supreme Court. In re Petition of Ronwin, SB-52, cert. denied, sub nom. Ronwin v. Committee on Examinations and Admissions of the Supreme Court of Arizona, 419 U.S. 967 (1974). The decision of the Arizona Supreme Court was final and on the merits. See Boynton v. Commonwealth of Virginia, 364 U.S. 454, 456-7 (1960) (summary disposition by state supreme court finally decided all issues presented below).

The only dispute is whether the cause of action is identical, given the federal courts' jurisdiction over federal antitrust claims. (Brief of United States at 29, n. 35). The

United States' position that the Arizona Supreme Court could not have considered a federal antitrust problem is erroneous. Both Feldman, 103 S.Ct. at 1313, n. 14 and Bates, 433 U.S. at 356-357, involved antitrust issues raised in state courts.^{18/}

IV. RONWIN'S OTHER ISSUES SHOULD NOT BE CONSIDERED.

Ronwin's Brief also attempts to present a constitutional challenge to the 1974 examination, attacks the Court of Appeals dismissal of the

^{18/} In Hayes v. Solomon, 597 F.2d 958, 984 (5th Cir. 1979), cert. denied, 444 U.S. 1078 (1980) and Kurek v. Pleasure Driveway & Park District of Peoria, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979), upon which the United States relies, the antitrust claims were either not raised or not considered in the state courts. See also England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 419 (1964) (federal claims presented to state court cannot be relitigated in federal court).

Examiners' spouses as defendants, and raises the issue of judicial immunity.

This Court declined to consider the first two issues which were presented in Ronwin's cross-petition for certiorari. Ronwin v. Hoover, et al., ____ U.S. ____, 103 S.Ct. 2110 (1983). There is no more reason to consider those issues now than when the Court declined the cross-petition.^{13'}

^{13'}In any event, the constitutional challenge would be barred by res judicata and by the district court's lack of jurisdiction. See discussion supra at 35-40. In addition, Ronwin's constitutional claim is based upon the same misunderstanding of scaled scoring as his antitrust claim. Testing and scaled scoring are constitutional because they are rationally related to a legitimate state interest in regulating the bar. See Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 239 (1957).

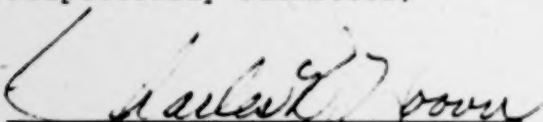
Ronwin finally argues that judicial immunity does not protect the Examiners. If this issue is considered, the Examiners submit that their conduct in applying the rule and making recommendations pursuant to Rule 28 are entitled to absolute judicial¹⁰ and prosecutorial immunity. Butz v. Economou, 438 U.S. 478 at 511-512 (1978).

¹⁰The Examiners' application of Rule 28(c) was no less a "judicial" proceeding than the act of the judges in refusing to waive the admission rule in Feldman, supra.

V. CONCLUSION

For the reasons stated above, the order and opinion of the United States Court of Appeals for the Ninth Circuit should be reversed and the order and judgment dismissing respondent's complaint should be reinstated.

Respectfully submitted,



CHARLES R. HOOVER

111 West Monroe

Phoenix, Arizona 85003

(602) 262-5911

Petitioner in Propria Persona
and Counsel for the Remaining
Petitioners

JEFFERSON L. LANKFORD

DONN G. KESSLER

JENNINGS, STROUSS & SALMON

111 West Monroe

Phoenix, Arizona 85003

602/262-5911

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IN THE

Supreme Court of the United States

October Term, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN, ROBERT D.
MYERS, and HOWARD J. WOLFINGER,

Petitioners,

vs.

EDWARD D. RONWIN,

Respondent.

In Support of Petitioners On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit.

**MOTION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE
AND
AMICUS CURIAE BRIEF OF
THE STATE BAR OF CALIFORNIA.**

Of Counsel:

O'MELVENY & MYERS,
400 South Hope Street,
Los Angeles, Calif. 90071-2899

and

HERBERT M. ROSENTHAL,
TRUITT A. RICHEY, JR.,
ROBERT M. SWEET,
555 Franklin Street,
San Francisco, Calif. 94102

HENRY C. THUMANN,
400 South Hope Street,
Los Angeles, Calif. 90071-2899
(213) 669-6000

*Counsel for Amicus Curiae,
The State Bar of California.*

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No. 82-1474
IN THE
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CHARLES R. HOOVER, HOWARD H. KARMAN, ROBERT D. MYERS
and HOWARD J. WOLFINGER,

Petitioners,

vs.

EDWARD D. RONWIN,

Respondent.

**MOTION FOR LEAVE TO FILE
BRIEF AS AMICUS CURIAE.**

The State Bar of California respectfully moves for leave to file the accompanying Amicus Curiae Brief in support of Petitioners. Petitioners have consented to its filing; Respondent has refused. The State Bar of California appeared as amicus curiae before the Court of Appeals both on Petitioners' original motion for rehearing and on the motion for rehearing which followed the issuance of the Court of Appeals' amended opinion.

I.

**THE STATE BAR OF CALIFORNIA'S
INTEREST IN THIS PROCEEDING.**

The State Bar of California is a public corporation. It exists as a constitutional agency under the judicial branch of California government. CAL. CONST. art. VI, § 9. Its Committee of Bar Examiners, like the Arizona Supreme Court's Committee on Examinations and Admissions, is a state agency. CAL. BUS. & PROF. CODE §§ 6046, 6046.5 (West Supp. 3B 1983).

As is the case in Arizona, California's committee is charged with the responsibility of examining all bar applicants and certifying to the state supreme court those who fulfill the established

requirements for admission. *Compare* CAL. BUS. & PROF. CODE § 6046 (West 1974), with ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973). In both California and Arizona the committee acts as an "arm" of its respective supreme court "for the purpose of assisting in matters of admission", with the ultimate admission authority remaining within the plenary authority of the court. *Compare* *Preston v. State Bar*, 28 Cal. 2d 643, at 650, 171 P.2d 435, at 438 (1946), with ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973). Moreover, again as in Arizona, California's committee employs "scaled scoring" in the grading of the multi-state portion of its bar examination. The California State Bar's Committee of Bar Examiners will accordingly be directly impacted by the Court's decision in this case.

II.

THE PROPOSED AMICUS CURIAE BRIEF.

The California State Bar's proposed brief seeks to demonstrate that the issues before the Court are not peculiar to Arizona. If anything, the impact of any decision significantly limiting the discretionary role of subordinate state agencies will be even more disruptive to the governance of a large bar such as California's than to the management of the lesser numbers practicing in Arizona.

The proposed brief argues that the Court of Appeals' decision is incompatible with the states' continued ability to make effective use of administrative agencies as part of their governmental structure. It is urged that such a result not only represents poor policy, but is the product of a legal standard which is contrary to the one employed by this Court in measuring the applicability of the Sherman Act to official governmental conduct.

The proposed brief next takes up the matter of state supervision and considers the unresolved issue as to whether, and if so to what extent, the exemption of official as opposed to private conduct may be dependent on such review. The suggestion is made that a flexible requirement which takes cognizance of the degree to which the agency is independent of its regulatory constituency may prove the most effective approach. Lastly, the proposed brief argues that the various damage immunities available to public

officials at common law should not be deemed abrogated by the Sherman Act.

As to each of these arguments, the proposed brief takes an approach and perspective which is distinct from that taken by the parties. By its last argument, it treats of an issue which is otherwise wholly unaddressed.

III.
CONCLUSION.

For all of the reasons set forth, the State Bar of California respectfully requests that its motion for leave to file the attached brief as amicus curiae be granted.

Respectfully submitted,
HENRY C. THUMANN,
Counsel for Amicus Curiae,
The State Bar of California.

Of Counsel:

O'MELVENY & MYERS,
and
HERBERT M. ROSENTHAL,
TRUITT A. RICHEY, JR.,
ROBERT M. SWEET.

**AMICUS CURIAE BRIEF OF
THE STATE BAR OF CALIFORNIA.**

**I.
INTEREST OF THE STATE BAR OF CALIFORNIA
AS AMICUS CURIAE.**

Like its Arizona counterpart, the Committee of Bar Examiners of the State Bar of California is a state agency. In Arizona the Supreme Court's Committee on Examinations and Admissions has been established by rule of the Arizona Supreme Court. ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973). In California, the State Bar's Committee of Bar Examiners derives its existence from legislative command. CAL. BUS. & PROF. CODE §§ 6046, 6046.5 (West Supp. 3B 1983). Pursuant to the administrative scheme of each state, its respective committee is charged with the responsibility of examining for substantive qualification all applicants who otherwise fulfill the established requirements for admission. *Compare* ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973), with CAL. BUS. & PROF. CODE § 6046 (West 1974).

In each case, the committee acts as an "arm" of its respective supreme court "for the purpose of assisting in matters of admission. . . ." *Compare Preston v. State Bar*, 28 Cal. 2d 643, at 650, 171 P.2d 435, at 438 (1946), with ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973). Consistent with this role, each committee's certification is advisory only with final authority as to admission remaining within the plenary power of the respective state's supreme court. *Compare Preston v. State Bar*, *supra*, with *Application of Courtney*, 83 Ariz. 231, 319 P.2d 991 (1958).

Among the various statutory qualifications which a California applicant must meet to be certified to the court for admission is the successful passage of a "final bar examination given by the examining committee." CAL. BUS. & PROF. CODE § 6060(f) (West Supp. 3B 1983). While the ultimate admission determination is made by the court, it is apparent that its seven members, given their other responsibilities, cannot themselves conduct the examination. Indeed, the California Supreme Court observed in as early as 1934 that: "No court can so examine more than five

hundred, or nearly a thousand, applicants and conduct its regular business." *In re Admission to Practice Law*, 1 Cal. 2d 61, at 69, 33 P.2d 829 at 832 (1934). By 1982, the number of applicants who sat for one or another of California's various bar examinations had increased to over 12,000.¹ Accordingly, if it is to be administratively possible for the court to meet its admission function, the committee, and not the court, must arrange for the composition, administration, and grading of the examination. *Cf.* CAL. BUS. & PROF. CODE § 6047 (West 1974).

This responsibility always has and always will subject the committee's members to accusation by unsuccessful candidates that the examiners "arbitrarily . . . [d]etermined in advance the number of applicants who should be permitted to pass the examination" and to that end selected "very hard" questions, established an "arbitrary" grading scale, and generally "refused" to fairly consider the "qualifications" of the applicant. *See In re Admission to Practice Law, supra*, at 63, 65, 33 P.2d 829, at 830, 831. But such charges are fully subject to review in the California Supreme Court which has plenary authority to re-examine the "entire record" of the challenged examination and, if warranted, order re-grading of the examination, modifications of the committee's rules, or the admission of uncertified applicants. *See id.* at 65-66, 33 P.2d at 831; *Brydonjack v. State Bar*, 208 Cal. 439, 445-46, 281 P. 1018, 1021 (1929); CAL. BUS. & PROF. CODE § 6066 (West 1974). Moreover, where the state supreme court determines to deny admission, any claim that such action is in conflict with the United States Constitution or any other allegedly preemptive federal law, including the antitrust laws, is subject to review in the United States Supreme Court by writ of certiorari. *Konigsberg v. State Bar of California*, 353 U.S. 252, 258 (1957); *cf. Bates v. State Bar of Arizona*, 433 U.S. 350, 353 (1977).

Prior to the Court of Appeals' decision in the instant case, it was generally understood that such procedure constituted the exclusive means by which a disappointed applicant could seek individual redress with respect to his or her examination failure.

¹Los Angeles Daily Journal, June 2, 1982, at 1; Los Angeles Daily Journal, November 30, 1982, at 1.

See *Brown v. Board of Bar Examiners*, 623 F.2d 605, 609-10 (9th Cir. 1980), cited with approval in *District of Columbia Court of Appeals v. Feldman*, U. S., 103 S.Ct. 1303, 1316 n.17 (1983). While that procedure provided the applicant with a fair opportunity for review, it likewise permitted the members and staff of the Committee of Bar Examiners to devote most of their limited time to the performance of their official functions. The decision of the Court of Appeals upsets that established balance by subjecting each committee member to the substantial diversion occasioned by an obligation to submit to the full panoply of individual discovery demands which are now placed at the disposal of every disappointed applicant who is prepared to allege that his or her examination failure was "arbitrary" and "anticompetitive."²

The State Bar of California is deeply concerned that the decision of the Court of Appeals will result in serious interference with its committee's ability to effectively carry out its responsibilities. Not only will it prove more difficult to attract quality volunteers to serve, but there is some unquantifiable danger that those who do serve will be deterred from that vigorous and independent exercise of responsibility which is so essential to the public interest. See generally *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

In light of the importance of this matter to California, its State Bar wishes by this brief to make clear that the issues to be decided are not matters peculiar to Arizona. On the contrary, those issues concern fundamental precepts which are central to the effective administration of bar admissions processes throughout the country.

II. STATEMENT.

Respondent's complaint contains a single claim for relief: the recovery of treble-damages in the amount of \$1,200,000 from the individual members of the Arizona Supreme Court's Committee on Examinations and Admissions on account of their alleged violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1976).

²See *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464 (1962).

(J.A. 5.)³ In apparent recognition that any claim seeking to effect Respondent's admission to the Arizona bar by way of injunction would be beyond the jurisdiction of the District Court,⁴ damages is the only remedy sought. *Ibid.*

The gravamen of Respondent's claim concerns the activities of the Petitioners, acting as the Arizona Supreme Court's Committee on Examinations and Admissions, in conducting the winter 1974 Arizona bar examination. (J.A. 8-11.) While Petitioners allegedly announced prior to the examination that a "grade of Seventy" would be required to pass, they "did not grade on a Zero to One Hundred (0 to 100) scale; rather, they used a 'raw score' system." (J.A. 9-10.) Pursuant to this "system", after the examination pool's raw scores were determined Petitioners established "a particular raw score value as equal to the passing grade of Seventy." (J.A. at 10.) Thus, the number of applicants who received a passing grade depended upon the raw-score value determined "as equal to Seventy", rather than on the applicants' achievement of a "pre-set" raw-score standard. *Ibid.*

The grading system so alleged is a procedure commonly known as "test standardization" or "scaled scoring." Its purpose is to identify an absolute level of achievement which remains constant despite inevitable variances in the degree of difficulty presented by necessarily non-duplicative succeeding tests. This is achieved through statistical correlation of a current applicant pool's relative performance on a limited number of repeat or control questions as compared to the performance of previous pools on those identical questions. This correlation is then statistically compared with the current pool's performance on its overall examination as com-

³The complaint named the spouse of each committee member and the State Bar of Arizona as additional defendants. (J.A. 1, 3-4.) The Court of Appeals' ruling in affirming the District Court's dismissal as to those defendants was the subject of a separate Petition for Certiorari which was denied by this Court. *Ronwin v. Hoover*, ... U.S. ..., 103 S.Ct. 2110 (1983). Accordingly, neither those parties nor the issues involved in their dismissal are before the Court.

⁴*See District of Columbia Court of Appeals v. Feldman* ... U.S. ..., 103 S.Ct. 1303 (1983); *Brown v. Board of Bar Examiners*, 623 F.2d 605 (9th Cir. 1980); *Chaney v. State Bar of California*, 386 F.2d 962 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011 (1968).

pared with previous pools' performance on their different overall examinations. By this process it is statistically possible to determine the degree by which the current overall test is either more or less difficult than the norm. Raw scores are accordingly adjusted up or down in such a manner as to result in an absolute measure of pass-fail performance which remains constant from examination to examination.⁵

This method does not result in any predetermined number of applicants either passing or failing, nor does Respondent so allege.⁶ On the contrary, it is designed to assure that a more able current applicant pool in fact passes in greater number than a less qualified previous pool despite the fact that the current pool may have obtained a lower array of raw scores as a result of its having taken a more difficult examination. This is the exact antithesis of grading "on a curve" which is concerned only with the relative performance of members of a single applicant pool, and which, accordingly, can prejudice applicants in a stronger pool while rewarding applicants in a weaker pool.

The complaint concludes with the naked allegation that the committee's employment of this scaled scoring methodology constituted "a conspiracy and combination" which was "intended to and did result in a restraint of trade and commerce" by "artificially reducing the numbers of competing attorneys in the State of Arizona," and that Respondent was among the applicants so affected (J.A. 10-11).

While not alleged in the complaint, it is a matter of judicial notice that the Arizona Supreme Court enjoys plenary authority

⁵See THE BAR EXAMINER'S HANDBOOK, pp. 61-62, 65-66 (2d ed. S. Duhl ed. 1980).

⁶Respondent's complaint alleges only that "the number of Bar applicants who would receive a passing grade depended upon the exact raw score value chosen as equal to Seventy" (J.A. 10). This is, of course, no more than a truism. Respondent is careful *not to allege* that the manner in which the pass-equivalency raw score value was determined had anything whatever to do with the accommodation of any pre-determined pass-fail ratio or any pre-determined limitation of the number of successful candidates.

concerning matters of admission to its bar.⁷ It was pursuant to that authority that it appointed its Committee on Examinations and Admissions and charged it to "examine applicants and recommend to this court for admission" those "who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules. . . ." ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973). "The court will then consider the recommendations and either grant or deny admission." *Ibid*.

Following the committee's failure to recommend Respondent for admission by reason of his not having achieved a standardized grade of 70, he was unsuccessful both in petitioning the Arizona Supreme Court for review and in petitioning this Court for a writ of certiorari. See *Ronwin v. Committee on Examinations and Admissions*, 419 U.S. 967 (1974).

It was on this record that the District Court granted Petitioners' motion for dismissal of Respondent's complaint for, among other reason: "failure to state a claim upon which relief can be granted." (J.A. 23.) On appeal, a divided panel of the Ninth Circuit reversed as to Petitioners, determining that the complaint stated a cause of action for damages under the Sherman Act because Petitioners' employment of the grading procedures alleged did not qualify for the immunity accorded state action under the doctrine of *Parker v. Brown*.⁸ (J.A. at 73, 83.)⁹

III.

SUMMARY OF ARGUMENT.

A.

We first argue that in determining whether conduct undertaken pursuant to state authorization is subject to the proscriptions of the Sherman Act, a distinction is made between conduct which

⁷*Application of Levine*, 97 Ariz. 88, 397 P.2d 205 (1965); *Application of Burke*, 87 Ariz. 336, 351 P.2d 169 (1960); *Application of Courtney*, 83 Ariz. 231, 319 P.2d 991 (1958).

⁸317 U.S. 341 (1943).

⁹686 F.2d 692, 698 (9th Cir. 1982). The decision of the Court of Appeals as amended on rehearing appears in the Joint Appendix at 73. All citations will be to the appendix with footnotes supplying the parallel citations to the published report.

is essentially private and conduct which represents official governmental action. As to the former, a test involving some measure of state compulsion is used. As to the latter, however, it is only necessary that the conduct be authorized pursuant to a clearly articulated sovereign policy to replace competition with government regulation. We argue further that once such a state policy has been clearly declared, it is not necessary in delegating discretionary authority to subordinate agencies that the sovereign articulate every regulatory detail. Such a requirement would be inconsistent with the very function of agency administration and would effectively result in a prohibition against state use of this effectual form of government.

We point out that such an undesirable result is not suggested by the applicable precedents of this Court. On the contrary, we urge that a correct application of those precedents establishes that the activity in issue enjoyed sufficient sovereign authorization to qualify as state action beyond the scope of the Sherman Act.

B.

We next point out that a requirement for active state supervision has been established as a second criterion that must be met before private conduct can qualify as exempt state action. We argue, however, that this Court's decisions are unclear as to whether and to what extent such a requirement is applicable to governmental conduct, though plainly no universal requirement for such supervision has been imposed. We suggest that a flexible standard which takes cognizance of the degree to which the agency is independent of its regulatory constituency may prove most appropriate. We conclude by pointing out that the plenary role played by the Arizona Supreme Court in the bar admission process adequately meets any requirement for active state supervision which may be deemed applicable.

C.

We last argue that Petitioners are in any event entitled to the various damage immunities available to public officials at common law. Whether such immunities are abrogated by the Sherman Act is a matter of statutory construction. However, we point out that this Court has interpreted the equally general language of the civil rights acts as not evidencing a blanket Congressional

intent to override such immunities. Under this Court's precedents in the civil rights context, Petitioners would have a strong claim to both derivative absolute immunity and functional absolute immunity. Moreover, we argue that even if Petitioners were accorded only qualified immunity, they would in the circumstances of this case nevertheless be entitled to judgment.

We conclude by pointing out that the state-action focus of the civil rights laws implies a narrower role for governmental immunities than does the predominately private-action focus of the Sherman Act. Accordingly, if vigorous state regulation is not to be chilled, the Sherman Act must not be interpreted as abrogating or limiting any of the damage immunities available to public officials at common law.

IV. ARGUMENT.

A. The Sovereign Authorization of the Official Activity Here in Issue Was Sufficient to Constitute Petitioners' Conduct State Action Beyond the Proscription of the Sherman Act.

It appears common ground between the majority and dissenting judges below that the Arizona Supreme Court's Committee on Examinations and Admissions is a state agency and that the Petitioners were acting in their official capacity as members of that agency in implementing the grading procedure in issue. (*Compare* J.A. at 79-80,¹⁰ *with* J.A. at 100).¹¹ It also appears to be common ground that the question of whether or not such conduct is exempt from the Sherman Act as state action depends upon whether it was sufficiently authorized by the Arizona Supreme Court, the repository of the state's ultimate sovereign power with respect to matters of bar admission.¹² (*Compare* J.A. at 80-81,¹³ *with* J.A. at 100-101).¹⁴

¹⁰686 F.2d at 697.

¹¹686 F.2d at 705.

¹²ARIZ. CONST., art. 3; *see also* *Bates v. State Bar of Arizona*, 433 U.S. 350, at 360 (1977).

¹³686 F.2d at 696.

¹⁴686 F.2d at 705-06.

The question that divided the Court of Appeals concerns the degree of specificity that the Arizona Supreme Court is required to articulate in delegating authority to its committee. The majority thought it necessary that the Arizona Supreme Court promulgate a rule "directly requiring the challenged grading procedure." (J.A. at 79.)¹⁵ The dissent, on the other hand, thought it sufficient that the Arizona Supreme Court had by its rules clearly articulated that regulation was to displace free market entry and that, in furtherance of this policy, it had affirmatively directed its committee to " 'examine applicants' " for " 'the necessary qualifications' " (J.A. at 102-103).¹⁶

The Court of Appeal's majority derived its test of specific compulsion from language contained in this Court's opinion in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). That case involved two defendants, one of which was a private county bar association and the other of which, the Virginia State Bar, was designated by state statute as an administrative agency of the Virginia Supreme Court. *Id.* at 776. While the state bar was statutorily authorized to investigate and report violations of the state court's rules to that body, it enjoyed no authority either to regulate the pricing of legal services or to adopt any ethical standards. *Id.* at 790. Indeed, authority as to the latter was by statute expressly reserved to the supreme court itself. *Id.* at 789 n. 18. And pursuant to that authority, the supreme court had adopted ethical codes which "explicitly directed lawyers not 'to be controlled by fee schedules.'" *Id.* at 789.

Nonetheless, the state bar's non-statutory Committee on Economics of Law Practice issued two "minimum-fee-schedule reports" containing schedules of suggested minimum charges which it recommended the state bar consider adopting. *Id.* at 777 n. 4. While the state bar did not act on its committee's recommendation, the county bar association did. Indeed, not only did it adopt such a schedule, but it included therein the gratuitous advice that:

¹⁵686 F.2d at 696 (footnote omitted).

¹⁶686 F.2d at 706 (quoting ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973)).

"if a lawyer 'purely for his own advancement, intentionally and regularly bills less than the customary charges of the bar for similar services . . . [in order to] increase his business with resulting personal gain, it becomes a form of solicitation contrary to Canon 27 and also a violation of Canon 7, which forbids the efforts of one lawyer to encroach upon the employment of another.' " *Ibid* (quoting Fairfax County Bar Ass'n minimum fee schedule).

Despite the express contrary dictate of the Virginia Supreme Court,¹⁷ the state bar through its Committee on Legal Ethics thereafter issued an advisory opinion which stated that "evidence that an attorney *habitually* charges less than the suggested minimum fee schedule adopted by his local bar association, raises a presumption that such lawyer is guilty of misconduct" *Id.* at 777-78 (quoting Opinion No. 170). While the Chief Justice in writing this Court's opinion in *Goldfarb* assumed that the state bar's Committee on Legal Ethics had the general "power to issue ethical opinions," the state bar had apparently failed to cite any statute or Virginia Supreme Court rule which affirmatively addressed the practice. *Id.* at 791. Moreover, as the Chief Justice expressly pointed out, the record contained no indication that such opinions were in any way subject to supervisory review by the Virginia Supreme Court. *Ibid.*

On those facts, this Court stated that "[T]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *Id.* at 790. Finding that none of the conduct in issue was "compelled by direction of the State acting as a sovereign", the Court's analysis with respect to the private county bar was complete. *Id.* at 790-91. With respect to the public state bar, however, the Court's consideration continued, culminating in the following holding:

"The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary

¹⁷See p. 12 *supra*.

action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act." *Id.* at 791-92 (citations and footnotes omitted, emphasis added).¹⁸

Goldfarb accordingly does not stand for the proposition that immunity with respect to all state agency conduct is dependent on sovereign compulsion. Indeed, just as some portion of a state agency's activity being official does not entitle it to have other essentially private conduct evaluated as if it were public, so likewise the fact that some portion of a state agency's activity may be private does not condemn it to have other conduct which is official evaluated as if it were not. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).¹⁹

The other leading decision of this Court which rejected a state-action immunity defense because the conduct in issue was not sufficiently compelled also concerned private action. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). There an electric power utility argued that its free light-bulb-exchange program was immune from attack as an illegal tie-in because it was set forth in

¹⁸In support of this holding the Court cited to that portion of the opinion in *Parker v. Brown* itself where Chief Justice Stone had pointed out that the case did not involve "the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade" See 317 U.S. at 351-52.

¹⁹In *Bates* the Court considered a challenge to the validity of an ethical rule promulgated by the Arizona Supreme Court and enforced by means of disciplinary proceedings initiated by the state bar. The only language in this Court's opinion having any commonality with the semantics of the "compulsion" cases was the inapposite observation that the rule itself was subject to state action immunity because it represented "the affirmative command" of the "State acting as a sovereign." 433 U.S. at 360. By contrast, in determining the applicability of the state action exemption to the state bar's activity in connection with its enforcement of the rule, the Court spoke only of the bar serving in a "defined" role as the "agent of the court" while subject to "continuous supervision" by way of the aggrieved party's right to judicial review. *Id.* at 361. That analysis anticipated exactly the Court's subsequent elaboration of the sovereign authorization test articulated in *Lafayette* and *Boulder* and demonstrates the full applicability of that test to the present situation. See discussion at pp. 15-16 *infra*.

a tariff approved by the state public utility commission. In rejecting this defense on the ground that the utility enjoyed effective freedom to either file, withhold, or withdraw the tariff in question, Justice Stevens emphasized the private nature of the conduct in issue and repeatedly suggested that the Court's decision might well have been different had the official conduct of the public utility commissioners been the subject of suit. *Id.* at 585, 589, 591 n. 24, 601.²⁰

Indeed, that precise distinction was made clear in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). There the Court for the first time considered a claim for antitrust redress based upon the official conduct of a subordinate governmental unit.²¹ Justice Brennan, writing for a four-Justice plurality,²² pointed out the fundamental difference between such a claim and the one considered in *Cantor*:

"*Cantor* was concerned with whether anticompetitive activity in which purely private parties engaged could, under the circumstances of that case, be insulated from antitrust enforcement. The situation involved here, on the other hand, presents the issue of under what circumstances a State's subdivisions engaging in anticompetitive activities should be deemed to be acting as agents of the State." 435 U.S. at 410-11 n. 40.

²⁰The last three of these references are to portions of Justice Stevens' opinion in which only three other justices joined. See 428 U.S. at 581 n. †.

²¹Previous cases concerning the appropriateness of official state conduct under the federal antitrust laws involved only the question of whether the state scheme was preempted and thus unenforceable. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *Parker v. Brown*, 317 U.S. 341 (1943); *Olsen v. Smith*, 195 U.S. 332, 344-45 (1904). See also *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (post-*Lafayette* preemption cases). None of these cases considered whether or not the official conduct of any agency or official could result in an exposure to antitrust liability.

²²The position of the four-Justice plurality in *Lafayette* has since been adopted by a majority of the Court. See *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982).

Having so cleaned the precedential slate, Justice Brennan formulated an entirely new test which required that the conduct in issue be an act of government undertaken by the agency "pursuant to state policy to displace competition with regulation or monopoly public service," *id.* at 413, and that such policy must be "clearly articulated and affirmatively expressed." *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, at 52 (1982). In order to qualify pursuant to that standard, the conduct of the subordinate agency must have been "authorized or directed by the state." *City of Lafayette, supra*, at 414 (emphasis added). In discussing the form of authorization required, Justice Brennan made clear that it was not necessary to point to any state consideration of the specific conduct in question, so long as it "is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' " *Id.* at 415 (quoting the opinion below, 532 F.2d 431, 434 (5th Cir. 1976)).

The degree of generality embraced by this standard was considered in *Boulder*. The Court there rejected the argument that a state's summary delegation of home rule power to a city "comprehended within the powers granted" "Boulder's enactment of an allegedly anticompetitive CATV franchise ordinance. *City of Boulder, supra*, at 55. That conclusion was based on the Court's determination that such a general delegation of power which did not even address CATV franchising was necessarily neutral with respect to the question of whether economic regulation or free-market competition was contemplated by the legislature as the appropriate mode of industry structure. *Ibid.* The Court went on to suggest, however, that the result might well have been different had Colorado's statute embraced "an affirmative addressing" of the concept of CATV regulation. *Ibid.*

Indeed, any requirement that the sovereign's authorization contain an articulation of every regulatory detail would effectively undermine state government's use of administrative agencies. As recognized by this Court in another context:

"But the effectiveness of both the legislative and administrative processes would become endangered if [the sovereign] were under the constitutional compulsion of filling in the details beyond the liberal prescription here. Then the

burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) (considering claim that statute delegating broad discretion to federal agency constituted an unconstitutional delegation of legislative power).

The present antitrust challenge of an agency-implemented statistical grading methodology is analytically indistinguishable from future complaints that a particular examination question was not authorized by a sovereign mandate to determine qualification because it was unfairly difficult; that the relative number of points assigned a particular examination question was not authorized by a sovereign mandate to determine qualification because the subject occupies a disproportionately smaller part of the overall legal practice; or that an examination session limited to three hours was not authorized by a sovereign mandate to determine qualification because a lawyer working in his office could take a longer time to analyze the problem. If each of these and a myriad of other committee determinations must be specifically mandated by the state court, it had better administer its own examination.

But this Court's requirement that subordinate state agencies operate pursuant to clearly indicated sovereign policy to displace competition with regulation never contemplated any necessity for the articulation of such regulatory detail. And inasmuch as the present case involves only official action of state agents, it is the *Lafayette-Boulder* "state authorization" test rather than any *Goldfarb-Cantor* "compulsion" test which controls. On applying that test in the present setting, there can be no question but that the state acting as sovereign contemplated that regulation rather than free market entry was to govern the admission of applicants to the bar. ARIZ. REV. STATS. ANN. 17A, rule 28(a) (West 1973). To that end, the Committee on Examination and Admissions was, among other things, directed to "examine applicants and recommend to [the] court for admission to practice applicants who are found by the committee to have the necessary qualifications." *Ibid.* Clearly, such authorization "contemplates" that the committee would establish both standards and grading procedures by which it would determine its recommendations.

While the particular grading procedure chosen was wholly appropriate to this end,²³ the availability of the state action exemption in no way turns on that fact. Even if the system chosen were deemed unduly or arbitrarily restrictive, it would not change the fact that the state as sovereign contemplated the general "kind of action complained of" as opposed to the "specific" challenged conduct. See *City of Lafayette*, *supra*, at 415. The most that could reasonably be said is that the committee, while operating within its general ambit of authority, committed error by adopting an inappropriate grading system. But as pointed out by Professor Areeda:

"If an allegation of agency error or other unauthorized action is enough to deny antitrust immunity for public agencies, virtually every zoning decision, franchise grant, utility tariff ruling, or other routine governmental act will be subject to antitrust scrutiny. *Lafayette's* authorization requirement should not be read to transform most review of state administrative law into a federal antitrust task. The key factor in *Parker* and for all the *Lafayette* Justices was the existence of a state policy that intentionally displaces antitrust law. Erroneous application of that policy by local officials does not negate the underlying state authorization." Areeda, *Antitrust Immunity for "State Action"* After *Lafayette*, 95 HARV. LAW REV. 435, at 450 (1981).

That position not only represents sound policy, but it clearly comports with both *Lafayette's* and *Boulder's* teachings as to the generality of authorization which will be deemed sufficient once a clearly articulated state policy to supplant competition is found.

B. The Availability of Arizona Supreme Court Review of Its Committee's Admission Recommendations Satisfies Any Applicable Requirement for Active State Supervision.

The Court of Appeals majority did not have occasion to resolve the question of state supervision, a separate aspect of state-action immunity which was most fully discussed in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980). The Court there held California's "fair-trade"

²³See discussion at pp. 7-8, *supra*.

law relating to wine pricing preempted by the Sherman Act. Although the pricing scheme was sufficiently articulated as state policy, California simply enforced "the prices established by private parties" without either review or regulation. *Ibid.* The Court held that a statute which permitted such unsupervised private conduct did not enjoy state-action immunity and accordingly conflicted with the Sherman Act. While *Midcal* makes clear that private conduct will not qualify for state action immunity unless it is supervised by an agency of the state, the decision does not address whether or to what extent state agency action must itself be supervised by the ultimate sovereign.

In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), the Court determined that a statutory scheme regulating the establishment and relocation of automobile dealerships represented valid state action which was not preempted by the Sherman Act. While the Court pointed out that the role which the statute accorded private conduct was subject to supervision by a state board, it apparently did not deem it material to explore whether that board was itself subject to sovereign supervision. See 439 U.S. at 110. On the other hand, in finding the Arizona State Bar's role in lawyer disciplinary proceedings valid state action, the Court seemed to place some emphasis on the supervisory function performed by the Arizona Supreme Court. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977). Impliedly acknowledging that there has been no definitive determination with respect to any requirement that subordinate governmental units be supervised, the Court in *Boulder* expressly noted that it was not reaching the question of whether the city ordinance there in issue "must or could satisfy the 'active state supervision' test focused upon in *Midcal*." 455 U.S. at 51-52 n. 14.

While it seems clear from *New Motor Vehicle Board* that not all state agencies are subject to an active supervision requirement, it is less clear that none are. Perhaps the key lies in the degree to which they are structurally independent of the area of activity which they regulate. Compare, *cf.*, *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 508-10 (4th Cir. 1959), with *Allstate Insurance Company v. Lanier*, 361 F.2d 870, 873 (4th Cir. 1966).

But whatever the test that this Court may ultimately formulate, and whatever its applicability to Petitioners, it is clear from this Court's holding in *Bates* that the supervisory role played by the Arizona Supreme Court fully satisfies any requirement that may be imposed.²⁴ If anything, the Arizona Supreme Court's directly appointed committee is more independent of the admissions process than was the lawyer-elected²⁵ Board of Governors independent of the disciplinary process considered in that case. See *Bates v. State Bar of Arizona*, *supra*, at 356.

C. Petitioners in Any Event Enjoy Immunity From Civil Damage Liability Which Is Sought to Be Imposed on Account of Their Official Conduct .....	20

This Court has not as yet found it necessary to determine whether public officials are answerable in personal damages on account of official conduct found violative of the antitrust laws.²⁶ Should the Court conclude, however, that the claim set forth in the present complaint is not substantively negated by the state-action immunity doctrine, that remedy issue will be presented. The only relief sought in the complaint is treble-damages, and the only defendants remaining are public officials. If a damage remedy does not lie against such officials, the complaint will necessarily fail to state a claim on which relief can be granted,²⁷ and the Court of Appeals' reversal of the District Court's dis-

²⁴As was true of the Board of Governor's disciplinary determination in *Bates*, the present committee's admission recommendations are subject to full review by the Arizona Supreme Court. ARIZ. REV. STATS. ANN. 17A, rule 28(c) XII E.(c) (West 1973), *as amended*, rule 28(c) XII F.1 (West Supp. 1982).

²⁵See ARIZ. REV. STATS. ANN. 17A, rule 27(e) 4 (West Supp. 1982).

²⁶The complaints in *Boulder* and *Lafayette* sought injunctive relief as well as damages and thus stated a claim without regard to the availability of a damage remedy. 455 U.S. at 46; 435 U.S. at 392. The complaint in *Cantor* did not name any public official as a defendant. 428 U.S. at 585.

²⁷*Imbler v. Pachtman*, 424 U.S. 409, 416 (1976).

missal will have been error.²⁸

The question of whether and to what extent a damage remedy is available under the Sherman Act is a matter of statutory construction. *Cf. Briscoe v. Lahue*, U.S., 103 S.Ct. 1108, 1111 (1983). This Court has on numerous occasions determined that Congress' use of such general statutory language as "every person . . . shall be answerable . . . for damages" does not necessarily indicate a Congressional intention to abrogate established common law damage immunities. *E.g., Imbler v. Pachtman*, 424 U.S. 409, at 417 (1976) (interpreting the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976)).²⁹ The question in each instance is whether "the same considerations of public policy that underlie the common-law rule likewise countenance" immunity under the statute. *Id.* at 424.

The conduct of the admission function requires such substantial time and attention that no court can any longer be expected to meet its admission responsibilities alone. Indeed, the California Supreme Court long ago observed: "No court can so examine

²⁸The court below thought that the "case's preliminary posture" made it unnecessary to address the remedy issue. (J.A. 80, n. 5, 686 F.2d 697 n. 5.) But since the unavailability of a damage remedy would have validated the District Court's dismissal, this was error. *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). There is a closer question as to whether the remedy issue is presented for this Court's review by the Petition for Certiorari. However, the Petition does tender the question as to whether the acts of the Petitioners undertaken in the course of their membership on a state committee are "immune from federal antitrust liability" on account of their state action status. Where the only liability sought to be imposed is damage liability, the issue of whether such a remedy is available with respect to such governmental action would appear fairly embraced within the question framed.

²⁹The comparable language in Section 5 of the Clayton Act is: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained. . . ." 15 U.S.C. § 15 (1976). This section supersedes a similar section contained in the original Sherman Act. Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210. This Court has noted in the immunity context that there is precedent for giving the Sherman Act less than a "literal reading". See *Briscoe v. Lahue*, *supra*, at, 103 S.Ct. at 1113 n. 8.

more than five hundred, or nearly a thousand, applicants and conduct its regular business." *In re Admission to Practice Law*, 1 Cal. 2d 61, at 69, 33 P.2d 829, at 832 (1934). Those 1000 applicants of 1934 have become today's 12,000. See note 1 *supra*, p. 5.

The near universal solution has been the establishment of an administrative adjunct to the court, such as Arizona's Committee on Examinations and Admissions. BAR ADMISSION RULES AND STUDENT PRACTICE RULES 30-33, chart IV (F. Klein ed. 1978). Such agencies variously recommend and/or establish rules and procedures for the conduct of the bar examination, administer and grade the examination, and recommend successful candidates for admission. *Id.* at 37-38. All this activity takes place under the supervisory authority of the state's highest court which retains to itself the ultimate power to admit or not and the ultimate authority to establish the rules pursuant to which it will or will not do so. *E.g. Application of Courtney*, 83 Ariz. 231, 319 P.2d 991 (1958); *In re Admission to Practice Law*, 1 Cal. 2d 61, 33 P.2d 829 (1934); see also BAR ADMISSION RULES AND STUDENT PRACTICE RULES, *supra*, at 29.

In performing these various tasks, the committee's work might variously be described as legislative,³⁰ ministerial,³¹ or quasi-prosecutorial.³² But whatever the arguably least ill-fitting of these imperfectly tailored precedential garments, one thing appears clear:

"it is literally impossible, in view of the complexities of the modern [judicial] process, with [courts] almost constantly in session and matters of [judicial] concern constantly proliferating, for Members of [the courts] to perform their [judicial and] legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the [judge's] performance that they must be treated as the latter's alter egos [in the admissions process]. . . ." *Gravel v. United States*, 408 U.S. 606, at 616-17 (1972) (adaptation of opinion according derivative absolute im-

³⁰*Cf. Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 731 (1980).

³¹See *In re Sommers*, 325 U.S. 561, 565-66 (1945).

³²*Cf. Butz v. Economou*, 438 U.S. 478, 515 (1978).

munity to an aide of a Member of Congress).

In determining whether an applicant is qualified for admission to its bar, the Arizona Supreme Court is engaged in a judicial act; *District of Columbia Court of Appeals v. Feldman*, U.S., 103 S.Ct. 1303, 1313 (1983); while in establishing generally applicable admission qualifications, the court is engaged in a legislative act. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, at 731 (1980). In both instances the court and its members enjoy absolute immunity from damage liability premised on such conduct. *Pierson v. Ray*, 386 U.S. 547 (1967); *Supreme Court of Virginia v. Consumers Union of the United States*, *supra* at 734. For reasons parallel to those relied upon in *Gravel* in extending the absolute immunity of a Congressman to his aide,³³ Petitioners have a strong derivative claim to the immunity enjoyed by the members of the Arizona Supreme Court with respect to the admissions process.

Moreover, were this a suit under 42 U.S.C. § 1983, Petitioners would have a strong claim pursuant to this Court's "functional" immunity doctrine. See *Butz v. Economou*, 438 U.S. 478, at 508-517 (1978). Petitioners' activity in failing to recommend an applicant to the court is functionally equivalent to the activity of an agency counsel in initiating quasi-judicial proceedings. See *Application of Levine*, 97 Ariz. 88, 397 P.2d 205, 207 (1965). In both cases the administrative action is but a preliminary to a plenary judicial determination. Thus, like the discretion of those initiating agency proceedings, the judgment which the Petitioners exercise in administering the admissions process "might be distorted if their immunity from damages arising from [a failure to recommend an applicant] was less than complete. While there is not likely to be anyone willing and legally able to seek damages from the officials if they [recommend admission], there is a serious danger that the decision to [withhold a recommendation] will provoke a retaliatory response." *Id.* at 515 (citation omit-

³³*Gravel v. United States*, *supra*, 616-19. While *Gravel* relied in part on the Speech and Debate Clause of the federal Constitution, its holding was not dependent on the applicability of that provision. See *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 403-405 (1979).

ted).³⁴ As observed by Judge Learned Hand, "to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, at 581 (2d Cir. 1949).

Moreover, even if Petitioners' activities are viewed as nothing more than executive administration, in the context of a civil rights suit they would nevertheless enjoy at least qualified damage immunity. *Butz v. Economou*, *supra*, at 504-508; *Scheuer v. Rhodes*, 416 U.S. 232, at 247-48 (1974). Under such immunity, an official is entitled to judgment "if the law" at the time the challenged activity occurred "was not clearly established" so that he or she could not "fairly be said to 'know' that the law forbade" the conduct in question. *Harlow v. Fitzgerald*, U.S., 102 S.Ct. 2727, at 2739 (1982). As of the early 1974 time frame here relevant, this Court had never suggested that state officials' performance of their local governmental responsibilities might place them in personal jeopardy of the Sherman Act.³⁵ Indeed, in Petitioners' circuit it was clear law that state agencies and subdivisions enjoyed absolute status immunity even as to their proprietary, much less governmental, activities. *See State of New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974). Petitioners would accordingly appear entitled to *Harlow* immunity on the face of Respondent's complaint.³⁶

³⁴The quotation is an adaptation of the portion of the Court's opinion which accords absolute immunity to agency officials for their activities in initiating quasi-judicial proceedings.

³⁵The only three state action exemption cases considered to that time were preemption cases. In both *Parker v. Brown*, 317 U.S. 341 (1943), and *Olsen v. Smith*, 195 U.S. 332 (1904), the Court held the state action in issue beyond the scope of the Sherman Act. In the only other case, the Court focused principally on Congress' intent in passing the Miller-Tydings Act. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

³⁶Under *Harlow* qualified immunity constitutes an affirmative defense. U.S. at, 102 S.Ct. at 2737. However, where, as here, the applicability of such a defense appears from the face of the complaint, dismissal for failure to state a claim is proper. *E.g.*, *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980) (statute of limitations); *Williams v. Murdoch*, 330 F.2d 745 (3d Cir. 1964) (*res judicata*); *Ginsburg v. Black*, 192 F.2d 823 (7th Cir. 1951) (privilege).

Moreover, the immunity decisions heretofore discussed all involved civil rights actions in which the plaintiff complained that the defendant official had deprived the claimant of his Constitutional rights under color of law.³⁷ In this context, a claim lies against state officials under the Civil Rights Act of 1871 "only because the wrongdoer is clothed with the authority of state law." *Monroe v. Pape*, 365 U.S. 167, 184 (1961). Accordingly, all "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity" less the exception consume the statute. *Scheuer v. Rhodes*, *supra*, at 243 (1974).

The Sherman Act, on the other hand, is principally directed against private restraints and trusts. See *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). In that context, there is far less basis for inferring from any general statutory language a Congressional intent to limit established common law immunities otherwise accorded public officials. Accordingly, the scope of absolute immunity available to public officials under the Sherman Act should, if anything, be significantly broader than that which is available in the civil rights context. Given our federalist form of government and its dual regulatory sovereignty, the full range of damage immunity available at common law must be preserved lest state officials be deterred from the vigorous exercise of the important state responsibilities necessarily delegated to them. Such preservation would clearly shield Petitioners from the damage claim set forth in the present complaint. *Barr v. Matteo*, 360 U.S. 564 (1959); *Spalding v. Vilas*, 161 U.S. 483 (1896); *Kendall v. Stokes*, 44 U.S. (3 How.) 86 (1847).

³⁷The single exception is *Gravel v. United States* which involved the question of immunity from grand jury process. See 408 U.S. at 608-609.

V.

CONCLUSION.

For all of the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case remanded with directions to affirm the District Court's dismissal of Respondent's complaint.

Respectfully submitted,

HENRY C. THUMANN,

Counsel for Amicus Curiae,

The State Bar of California.

Of Counsel:

O'MELVENY & MYERS,

and

HERBERT M. ROSENTHAL,

TRUITT A. RICHEY, JR.,

ROBERT M. SWEET.

August, 1983

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No. 82-1474

IN THE

ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN, ROBERT
D. MYERS AND HAROLD J. WOLFINGER,

Petitioners,

v.

EDWARD RONWIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
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**AMICI CURIAE BRIEF FOR THE STATES OF COLORADO,
IOWA, MARYLAND, NEW YORK, TENNESSEE, TEXAS
AND WISCONSIN IN SUPPORT OF RESPONDENT**

STEPHEN H. SACHS

Attorney General of Maryland
Counsel of Record

CHARLES O. MONK, II

Assistant Attorney General and
Chief, Antitrust Division

LINDA H. JONES

Assistant Attorney General

7 North Calvert Street

The Munsey Building

Baltimore, Maryland 21202

(301) 576-6470

Attorneys for State of Maryland

DUANE WOODARD
Attorney General of Colorado
THOMAS P. McMAHON
First Assistant Attorney General
Chief, Antitrust Unit
1525 Sherman Street, Third Floor
Denver, Colorado 80203
(303) 866-3611

Attorneys for State of Colorado

THOMAS J. MILLER
Attorney General of Iowa

JOHN R. PERKINS
Assistant Attorney General
Hoover State Building, Second Floor
Des Moines, Iowa 50319
(515) 281-3110

Attorneys for State of Iowa

ROBERT ABRAMS
Attorney General of New York

LLOYD CONSTANTINE
Assistant Attorney General
Bureau Chief, Antitrust Bureau
Two World Trade Center, Room 4579
New York, New York 10047
(212) 488-7404

Attorneys for State of New York

WILLIAM M. LEECH, JR.
Attorney General of Tennessee

WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-2672

Attorneys for State of Tennessee

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant Attorney General

JAMES V. SYLVESTER
Chief, Antitrust Division
Assistant Attorney General
P.O. Box 12548
Austin, Texas 78711
(512) 475-4565

Attorneys for State of Texas

BRONSON C. LaFOLLETTE
Attorney General of Wisconsin

MICHAEL L. ZALESKI
Assistant Attorney General
Antitrust and Criminal Litigation Unit
Wisconsin Department of Justice
P.O. Box 7857
Madison, Wisconsin 53704-7857
(608) 266-3016

Attorneys for State of Wisconsin

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AMICI CURIAE BRIEF FOR THE STATES OF COLORADO,
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INTEREST OF THE STATES OF COLORADO,
IOWA, MARYLAND, NEW YORK, TENNESSEE,
TEXAS AND WISCONSIN

The *amici* states have a significant interest in the applicability of the antitrust laws to occupational and professional licensing. Regulation of various professions and occupations though licensure is a traditional exercise of state police power for the protection of the health, welfare and economic well-being of state citizens. In addition, the *amici* states have a significant interest in

preserving the fundamental principles of free competition embodied in federal and state antitrust laws. It is critical to the *amici* states that the tension between these two sometimes conflicting interests be resolved appropriately.

Because of the important public interests served by professional licensing, it is of utmost importance to the states that the integrity of professional and occupational licensing be maintained. At the same time, the *amici* states recognize the significant potential for injury to competition which is inherent in a licensing system which frequently permits members of the regulated profession to perform the licensing and regulatory functions. In order to serve these disparate interests, the *amici* states believe that licensing restrictions imposed by state boards should be strictly limited to the restraints actually authorized by the states' ultimate policy-making authority, so that the public will be protected by the licensing process but at the same time will receive the maximum benefits of free and open competition.

In sum, the *amici* states believe that through considered application of the antitrust laws to occupational and professional licensing and regulation, these dual interests may be served. Proper application of the antitrust laws can ensure that the interest of the states in maintaining free competition among regulated occupations will be preserved without interfering unduly with the states' legitimate interest in regulating professions.

SUMMARY OF ARGUMENT

The court of appeals was correct in holding that the members of the Arizona Committee on Examinations and Admissions ("Bar Examiners") were not exempt from federal antitrust scrutiny when they allegedly imposed an artificial restraint upon admissions to the Arizona bar. The Bar Examiners' alleged manipulation of examination

grades to limit the number of admittees recommended to the state supreme court constitutes a *per se* unreasonable group boycott in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, unless this conduct is exempt under the state action doctrine.

The state's decision to regulate bar admissions standing alone is not sufficient to immunize the anticompetitive restrictions imposed by the Bar Examiners; rather, the Bar Examiners' conduct can be exempt only if it satisfies the test set out in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). The *Midcal* test, as developed in recent state action decisions, requires that the challenged restraint must be "clearly articulated and affirmatively expressed as state policy." If the challenged conduct is not specifically authorized by state policy, it may nevertheless satisfy the *Midcal* test if it is clearly necessary to effect state policy regarding competition.

The Bar Examiners' alleged imposition of a *de facto* quota on new bar admissions was not required by nor was it clearly necessary to effect the state supreme court's policy requiring a minimum level of competency to practice law. Consequently, the Bar Examiners are not immune under the state action doctrine from liability for imposing the alleged restraint.

ARGUMENT

This case raises the specific issue of the applicability of the antitrust laws to a *de facto* quota on bar admissions imposed by a committee of Arizona lawyers appointed by the state supreme court.¹ Stated simply, respondent

¹ The Arizona Bar Examiners are appointed by the court from a list of nominees submitted by the State Bar Association. Ariz. Sup. Ct. R. 28(a). All lawyers practicing in Arizona are required to be active members of the State Bar Association. Ariz. Sup. Ct. R. 27(a)(3).

alleges that the Arizona Bar Examiners, by adjusting the raw scores on the bar examination to limit the number of admittees, created an artificial restraint upon competition among members of the Arizona bar. The court of appeals below ruled that the alleged conduct of the Bar Examiners in restricting bar admissions is subject to antitrust scrutiny.

This case also raises broader questions concerning the proper application of the antitrust laws to entry barriers and other trade restraints imposed by state occupational licensing boards.

I. THE ANTICOMPETITIVE RESTRICTIONS IMPOSED BY THE ARIZONA BAR EXAMINERS ARE NOT AUTOMATICALLY IMMUNIZED FROM ANTITRUST SCRUTINY SIMPLY BECAUSE THE STATE HAS CHOSEN TO REGULATE BAR ADMISSIONS.

The Bar Examiners' principal argument for immunity is that because the Arizona Supreme Court has chosen to regulate entry to the legal profession any restraint upon admission imposed by them is exempt from antitrust scrutiny under the state action doctrine. This argument is without support in existing case law and is wrong as a matter of federal-state policy.

In *Parker v. Brown*, 317 U.S. 341 (1943), the Court considered the applicability of the Sherman Act, 15 U.S.C. §§ 1-7, to state regulation specifically directed by a state legislature. The Court concluded that Congress did not intend "activities directed by [a state's] legislature" to result in liability under the Sherman Act. *Id.* at 350-51. The Court ruled that a regulatory system established by the California Agricultural Probate Act to control the production and marketing of raisins in order to maintain prices at artificial, non-competitive levels was exempt

from federal antitrust challenge. Significantly, the Court based its decision on the concept that the challenged restraint was imposed by the state as sovereign acting through explicit statutory mandate. *Id.* at 352. The Court did not consider whether state officials, acting in the context of a general regulatory scheme but without explicit legislative authority, would be immune from antitrust suit when they imposed trade restraints.

Beginning in 1975, the Court has decided a series of cases in which it has refined and narrowed the doctrine originally expressed in *Parker*.² This line of decisions includes cases involving conduct by private parties as well as cases challenging conduct of state agencies and local governments.³

² *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

³ Two of the seven cases dealt with the applicability of the state action doctrine to municipalities and other political subdivisions. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

Two other cases addressed the state action doctrine in the context of conduct by private parties which was related to a state regulatory scheme. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

In three cases, the Court faced the specific issue of the antitrust liability of state agencies. In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), the issue was the antitrust exposure of a California board charged with the responsibility of evaluating applications for opening new automobile dealerships. Two other cases determined the application of the state action doctrine to state bar associations which

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court addressed the issue of whether a minimum fee schedule established by the Virginia State Bar was immune under state action. Under the rules of the Virginia Supreme Court, the State Bar, a quasi-state agency, had the responsibility of enforcing disciplinary rules governing members of the bar. Through its enforcement mechanism, the State Bar mandated a minimum fee schedule for legal services. The Court held that enforcement of the fee schedule was not immune because it was imposed by the State Bar and not by the state supreme court. In its decision, the Court explained:

The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. . . . Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules requires the anticompetitive activities of either respondent. . . . *The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.*

421 U.S. at 790 (emphasis added) (citations and footnote omitted).

Two years later, in another case involving the regulation of Arizona lawyers, the Court applied the same analysis. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). In contrast to the situation in *Goldfarb*, the Arizona Supreme Court had adopted a rule prohibiting price advertising by lawyers. The state court had dele-

had authority under state law for enforcing the rules of professional responsibility for lawyers. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

gated the authority to enforce its rule to the state bar association, also a quasi-state agency. This Court ruled that the state bar's conduct was immune under the state action doctrine because the restraint was adopted not by the state bar but by the state supreme court:

In the instant case, by contrast [to *Goldfarb*], the challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules 27(a) and 29(a) and its Disciplinary Rule 2-101(B). That court is the ultimate body wielding the State's power over the practice of law, see Ariz. Const., Art. 3; . . . and, thus, the restraint is "compelled by direction of the State acting as a sovereign."

* * * *

. . . The disciplinary rules reflect a clear articulation of the state's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policymaker — the Arizona Supreme Court — in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.

Id. at 359-60, 362 (citations and footnote omitted). The Court concluded that restraints imposed by state agencies must be judged by reference to the authority granted to them by the state's ultimate policymaker.

The principles established in *Goldfarb* and *Bates* were extended to alleged anticompetitive conduct by state political subdivisions in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). The plurality opinion concludes that state agencies and subdivisions were not, "simply by reason of their status as such, exempt from the antitrust laws." *Id.* at 408. Mr. Justice Brennan, writing for the plurality, explained that *Goldfarb* "made it

clear that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign." *Id.* at 410. Thus, the *Lafayette* plurality reasoned that to the extent that a local government acts without authorization or direction by the state its actions are similarly not immune. In Justice Brennan's view this limitation on the power of local governments did not prevent them from being effective instrumentalities of state government:

Today's decision does not threaten the legitimate exercise of governmental power. . . . *Parker* and its progeny make clear that a State properly may, as States did in *Parker* and *Bates*, direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws. Compare *Bates*, with *Goldfarb*.

Id. at 416-17. The *Lafayette* plurality's reliance on *Bates* and *Goldfarb*, cases involving state agencies, makes clear its view that state agencies and political subdivisions will be treated alike for purposes of the state action doctrine.

In his opinion in *Lafayette*, Justice Brennan also recognized the danger in permitting a local government to impose anticompetitive restraints which may reflect "its own preference, rather than that of the State." *Id.* at 414. Precisely the same danger exists in the case of restraints imposed by state licensing boards. When state board members act without clear statutory authority, their actions may reflect their own private interests rather than the interests of the state.

The position taken by the plurality in *Lafayette* was adopted by six members of the Court in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). Again, the Court emphasized the importance of the language in *Parker* that the challenged restraints had been "directed by [the state's] legislature", *id.* at 54, and that exemption is premised on "Congress' intention to

embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Id.* at 53. *Boulder* made clear that for immunity to attach the subordinate governmental unit must have clear statutory authority to impose an anticompetitive restraint.

The Arizona Bar Examiners in this case do not exercise the full sovereign powers of the State of Arizona over regulation of bar admissions. Indeed, from reviewing the prior decisions of the Court, it is clear that only the Arizona Supreme Court, wielding the "State's power over the practice of law", has the authority to formulate policy in this area. The Bar Examiners are nothing more than the implementers of the policy adopted by the state supreme court.⁴ See *Bates*, 433 U.S. at 362. However, the fact that the Bar Examiners implement state policy

⁴ It is important, however, to note a distinction between occupational licensing board members and many other state officials. Unlike most government officials, board members are almost never state employees, but serve as volunteers while continuing to practice the profession they regulate. As in this case, see n.1, *supra*, they are very often appointed from a list submitted by their professional association. They are neither politicians nor civil servants, but competitors in the field they regulate. In this respect, they are more like private persons than public officials. Indeed, it is not unreasonable to suggest that their strict enforcement of state law has a personal, anti-competitive motivation rather than an altruistic one. Virtually all commentators on occupational licensing issues have strenuously argued this point. See, e.g., W. Gellhorn, *Individual Freedom and Governmental Restraints*, (1956); W. Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6, 11-12 (1976); Moore, *The Purpose of Licensing*, 4 J.L. & Econ. 93, 93-95 (1961); Shimberg, *The Professional and the Public*, 1-2 (Nov. 16, 1976), reprinted in *Restrictive and Anticompetitive Practices in the Eyeglass Industry: Hearings Before the Subcomm. on Monopoly and Anticompetitive Activities of the Senate Comm. on Small Business*, 95th Cong., 1st Sess. at 1369-70 (1977) (material submitted for the record by the staff of the Subcommittee) (hereinafter cited as *Eyeglass Hearings*); Sims, *State Regulation and the Federal Antitrust Laws: The Justice Department's View of Licensing — An Address before the*

regarding bar admissions does not end the inquiry as petitioners suggest.⁵ As explained below, the Bar Examiners' conduct must be tested against the authority granted them by the state supreme court to determine whether immunity attaches.

II. THE ARIZONA BAR EXAMINERS' ALLEGED MANIPULATION OF GRADES TO LIMIT THE NUMBER OF APPLICANTS RECOMMENDED FOR ADMISSION TO THE BAR WAS NOT IMMUNE.

The first step in analyzing the potential liability of the Bar Examiners is to evaluate the anticompetitive nature of the particular conduct. The basic allegation here is that members of the legal community manipulated the objective grades on the bar exam to limit artificially the number of new competitors admitted to the bar.⁶ Respondent alleges that, rather than recommending for admission all bar applicants who achieved an objective grade of 70,

National Council on Occupational Licensing, Inc. (August 4-5, 1975), reprinted in *Eyeglass Hearings* at 1353 (1977) (material submitted for the record by staff of the Subcommittee).

⁵ There is some limited authority among the lower federal courts for the position espoused by petitioners. *Llewellyn v. Crothers*, 1983-1 Trade Cas. (CCH) ¶65,358 (D. Ore. 1983); *Deak-Perera Hawaii, Inc. v. Department of Transportation, State of Hawaii*, 553 F. Supp. 976 (D. Hawaii 1983). However, this position is without question the minority view and is not supported by the general principles developed by this Court. In fact, the decision in *Deak-Perera* was expressly rejected by another judge in the same district. *Charley's Taxi Radio Dispatch v. SIDA of Hawaii, Inc.*, 562 F. Supp. 712 (D. Hawaii 1983; see also *Miller v. Oregon Liquor Control Commission*, 688 F.2d 1222 (9th Cir. 1982); *United States v. Texas State Board of Public Accountancy*, 592 F.2d 919 (5th Cir. 1979), *aff'd* 464 F. Supp. 400 (W.D. Tex. 1978), *cert. denied*, 444 U.S. 925 (1979).

⁶ Because the case has been appealed on a motion to dismiss, the entire record consists of the complaint and answer originally filed by the parties. For this reason, the facts are very sketchy. Nevertheless, because of the procedural status of the case, respondent's allegations must be taken as true. *Conley v. Gibson*, 355 U.S. 41 (1957); see also 2A J. Moore & J. Lucas,

the Bar Examiners manipulated the grades to limit artificially the number of new competitors. Reduced to their simplest terms, respondent's allegations charge a *per se* unreasonable group boycott by members of the established Arizona bar against new admittees in violation of section 1 of the Sherman Act.

There is no question that if a private professional association, rather than a quasi-official agency, had imposed such a restriction, its conduct would clearly violate the antitrust laws.⁷ In a case decided last term, the Court ruled that a private trade association violated section 1 of the Sherman Act by allowing one of its members to unreasonably withhold approval of a competitor's product in order to bar it from the marketplace. *American Society of Mechanical Engineers, Inc. v. Hydro-level Corp.*, 456 U.S. 556 (1982).

Assuming, as we must, that respondent's factual allegations are true, the Arizona Bar Examiners may escape liability only if the artificial restraint imposed by them is within the protection of the state action doctrine.

A. Anticompetitive Restrictions Imposed By Subordinate Governmental Entities Must Satisfy The Midcal Test.

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court

Moore's Federal Practice ¶12.08 (2d ed. 1982). Obviously, in the event that the decision below is affirmed, the case will be remanded and the factual circumstances can be developed in detail through discovery.

⁷ This Court has consistently ruled that activity by a trade or professional association to effect the removal of a certain competitor or competitive product from the market constitutes a *per se* violation of the antitrust laws. See *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.*, 364 U.S. 656 (1961); *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457 (1941).

reviewed its analyses in all the previous state action decisions and spelled out the following test for immunity:

These decisions established two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

445 U.S. at 105.

Application of the first portion of this test requires two steps. First, the state policy regarding competition must be identified. This requires a determination of which branch of state government wields the state's full sovereign powers over the regulated activity and what policy regarding competition the state has articulated. Then, the challenged restraint must be compared to the identified state policy. If the challenged restraint is "clearly articulated and affirmatively expressed" in the identified state policy, the first portion of the *Midcal* test is satisfied and the subordinate governmental entity imposing the restraint is immunized. The difficulty arises when authorization for the restraint is not clearly articulated and affirmatively expressed. In that case, the competing interests of the state in implementing its regulatory policy and of the federal government in promoting full competition can both be adequately served only by immunizing the subordinate state entity if the restraint it imposes is clearly necessary⁸ to effect the

⁸ The Court has used various formulations to describe the standard for comparison which should be employed. See, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 415 ("[W]e agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of

identified state policy regarding competition.⁹

The second standard for immunity identified in *Midcal* requires that the trade restraint be actively supervised by the state's agents rather than simply turned over to private control. This active supervision requirement recognizes the principle that immunity for private conduct is justified only if the workings of the marketplace are replaced with a state-controlled regulatory system.¹⁰

In analyzing the *Midcal* standard, it is essential to bear in mind that the state action doctrine represents an exception from the antitrust laws, which have been described as the "Magna Carta of free enterprise . . . [and] as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). An exception to a law which furthers such fundamental principles of our social and economic system should not be lightly extended. *Cantor*, 428 U.S. at 597 and n.37.

action complained of." (emphasis added) (citations omitted)); *Cantor v. Detroit Edison Co.*, 428 U.S. at 597 (the challenged restraint is permitted only to the "minimum extent necessary" in order to make the regulatory act work); *Goldfarb v. Virginia State Bar*, 421 U.S. at 791 ("It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be *compelled* by direction of the State acting as a sovereign." (emphasis added)).

⁹ If the state legislative scheme expresses no position regarding the restraints to be imposed upon competition and therefore the state's position can be described only as one of "mere neutrality", then the restraint does not meet the first part of the *Midcal* test. *Boulder*, 455 U.S. at 55.

¹⁰ In *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), the Court expressly left open the issue of whether a political subdivision's conduct must be actively supervised by the state in order to be immune from antitrust liability. *Id.* at 51 n.14. The Ninth Circuit in its opinion in this

Lower courts have not applied the *Midcal* test uniformly. Some courts have concluded that the "clearly articulated and affirmatively expressed" standard is satisfied whenever there is a statute which could even arguably support the trade restraint imposed. For example, the Court of Appeals for the Eighth Circuit in *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 1983-2 Trade Cas. (CCH) ¶65,575 (8th Cir. 1983), addressed a challenge to a municipality's prohibition of the operation of private landfills. The court found that there was no evidence that the Iowa legislature "actually contemplated that the agency responsible for the construction and operation of the landfill facility would have the exclusive right to dispose of solid waste or would engage in practices in restraint of trade." *Id.* at 68,855. Nevertheless, the court ruled that the local government's monopolization of solid waste facilities was exempt from antitrust scrutiny because of the court's judgment that the restraint was a "'necessary or reasonable consequence' of engaging in the authorized activity [(raising money to fund development of resource recovery facilities)]." *Id.* at 68,857 (citations omitted); see also *Hybud Equipment*

case implicitly ruled that the active state supervision requirement applied to state agencies as well as private entities. The Seventh and Eighth Circuits have reached the opposite conclusion in cases involving political subdivisions. *Gold Cross Ambulance and Transfer and Standby Service, Inc. v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), petition for cert. filed, 52 U.S.L.W. 3039 (U.S. July 25, 1983) (No. 83-138); *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), petition for cert. filed, 51 U.S.L.W. 3842 (U.S. May 11, 1983) (No. 82-1832). Although this issue need not be decided under the facts in this case, the amici states believe that the court of appeals below was wrong in concluding that state agencies must be actively supervised by the state's ultimate policy-making authority for immunity to attach. For example, although the active supervision requirement was not fulfilled in *Midcal*, it was clear that the Court intended that the requisite active supervision could be performed by the state agency regulating alcoholic beverages rather than by the California legislature.

Corp. v. City of Akron, 1983-1 Trade Cas. (CCH) ¶65,356 (N.D. Ohio 1983) (decision following remand by Supreme Court, 455 U.S. 931 (1982), which vacated prior court of appeals decision, 654 F.2d 1187 (6th Cir. 1981), for reconsideration in light of *Boulder*).

Other courts have applied the *Midcal* standard more stringently. In a case involving a municipality's alleged participation in a conspiracy to foreclose competition among parking lot operators, the Court of Appeals for the First Circuit stated that "absent explicit language, the political subdivision claiming exemption must illustrate the requisite state legislative intent by demonstrating by convincing reasoning that the challenged restraint is necessary to the successful operation of the legislative scheme that the state as sovereign has established." *Corey v. Look*, 641 F.2d 32, 37 (1st Cir. 1981) (footnote omitted); see also *Ratino v. Medical Service of the District of Columbia*, 1983-2 Trade Cas. (CCH) ¶65,641 (4th Cir. 1983).

The reasoning of the Court in *Boulder* supports the conclusion that the standard should be strictly applied. There the Court ruled that a general grant of home rule powers to Colorado cities was insufficient to establish state action immunity. The Court reasoned that "[a]cceptance of such a proposition — that the general grant of power to enact ordinances necessarily implies the state authorization to enact specific anticompetitive ordinances — would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." 455 U.S. at 56.

This reasoning from *Boulder*, as explained above, applies equally to a subordinate state agency such as the Arizona Committee on Examinations and Admissions. If the "clearly articulated and affirmatively expressed" standard were to be satisfied, as petitioners urge, by any

statement of general policy indicating an intention to regulate a certain profession or industry, the principles of free enterprise embodied in the antitrust laws could be seriously undermined. Consequently, the *amici* states believe that the national policy favoring competition and the states' interest in effective licensing of trades and professions are best served by careful scrutiny of anti-competitive regulatory conduct.

B. It Is Especially Appropriate That Anticompetitive Restraints Imposed By Occupational Licensing Boards Be Carefully Scrutinized.

In order to understand fully why careful scrutiny of restraints imposed by state licensing boards is appropriate, it is necessary to examine the reasons for and consequences of occupational licensing. The fundamental rationale for licensing is to protect the public from incompetent and fraudulent practitioners. Because it is assumed that lay people do not have the necessary expertise to evaluate the qualifications of applicants seeking entry to a particular occupation or to assess their competence, a system of self-regulation has evolved.¹¹ In

¹¹ One commentator has described the rationale for self-regulation as follows:

Once the legislature decides to exercise the police power to license the members of a profession, it is logical (on the surface) to transfer the licensing power to those with expertise, the existing members of the profession. The reason for licensing individuals is that the public is ignorant and incapable of judging the qualifications of sellers. The legislature, essentially, is no more qualified to determine competency than is the general public. It is logical to assume that only those already qualified in the profession can judge the competence of others to practice the profession.

Consequently, the majority of licensing boards are composed of active members of the profession being licensed.

Barron, *Business and Professional Licensing — California, A Representative Example*, 18 Stan. L. Rev. 640, 649 (1966).

general, licensing and regulatory boards are made up primarily, if not exclusively, of members of the occupation to be regulated.¹²

The *amici* states recognize that this system of licensing and self-regulation does serve a valid public interest. However, the anticompetitive potential inherent in such a system of regulation is obvious and cannot be disputed.¹³ Indeed, many critics have suggested that limiting competition, rather than protecting the public, is all too often the goal of licensing regulatory restrictions.¹⁴ This is an unfortunate, but natural result of a system in which members of the practicing profession control licensing standards and procedures. As one commentator stated:

Licensing individuals is not done primarily to limit the sellers in an occupation to some arbitrary number, but to insure minimum standards. . . .

¹² Largely as a result of the increasing concern that licensing boards all too often pursue their own interests rather than those of the public, there has been a movement in recent years to include "consumer members" on boards. However, even where this practice has been adopted, there is generally only one consumer member per board.

¹³ A significant body of commentary on the economic implications of occupational licensing has developed. Although the theoreticians do not necessarily agree on the correct analysis or the extent of the economic consequences, there is a consensus that occupational licensing, as it has traditionally been practiced, results in a lessening of competition, and hence in higher prices and perhaps even lower quality. See, e.g., Benham and Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & Econ. 421 (1975); Clarkson and Muris, *Constraining the Federal Trade Commission: The Case of Occupational Regulation*, 35 U. Miami L. Rev. 77, 79-82 (1980); Huber, *Competition at the Bar and the Proposed Code of Professional Standards*, 57 N.C.L. Rev. 559 (1979); Johnson and Corgel, *Antitrust Immunity and the Economics of Occupational Licensing*, 20 Am. Bus. L.J. 471 (1983); Shepard, *Licensing Restrictions and the Cost of Dental Care*, 21 J.L. & Econ. 187 (1977).

¹⁴ See *supra* note 4 and materials cited therein.

Prostitution of the public interest in the field of individual licensing occurs because the licensing function is transferred to the profession being licensed. . . .

* * * *

. . . [E]ntry requirements are often not for the purpose of protecting the public, but for the purpose of protecting the welfare of the licensees.

Barron, *Business and Professional Licensing — California, A Representative Example*, 18 Stan. L. Rev. 640, 649, 654 (1966) (emphasis in original).

To a significant extent, it is the factor of self-regulation, in addition to the assumption accepted for many years that professionals were entitled to a special exemption from antitrust laws,¹⁵ that resulted in many of the traditional limitations on competition among professionals. For example, prohibitions against advertising,¹⁶ prohibitions against competitive bidding,¹⁷ and enforcement of fee schedules¹⁸ are among the

¹⁵ Despite the Supreme Court's 1943 decision in the criminal antitrust prosecution of the American Medical Association, *American Medical Association v. United States*, 317 U.S. 519 (1943), the misconception that professionals were exempt from the antitrust laws continued to be vigorously asserted. The numerous decisions involving professionals during the last decade should have permanently dispelled that misconception. *American Medical Association v. Federal Trade Commission*, 455 U.S. 676 (1982), *aff'g* 638 F.2d 443 (2d Cir. 1980); *United States v. National Society of Professional Engineers*, 435 U.S. 679 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

¹⁶ *American Medical Association v. Federal Trade Commission*, 455 U.S. 676 (1982), *aff'g* 638 F.2d 443 (2d Cir. 1980); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

¹⁷ *United States v. National Society of Professional Engineers*, 435 U.S. 679 (1978); *United States v. Texas State Board of Public Accountancy*, 592 F.2d 919 (5th Cir. 1979), *aff'g* 464 F. Supp. 400 (W.D. Tex. 1978), *cert. denied*, 444 U.S. 925 (1979).

¹⁸ *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

practices which until recently were common among self-regulated professions. The anticompetitive effects of such restraints, often promulgated and enforced by state boards, have been significant.¹⁹ Strict antitrust compliance by occupational licensing and regulatory boards is a vital ingredient in any effort to achieve and maintain a higher level of competition among regulated occupations.²⁰ Finally, there is no principled basis for creating a different state action standard for bar admissions boards than for boards of medical examiners, boards of professional plumbers or any other professional or occupational licensing boards.²¹ *Bates v. State Bar of*

¹⁹ See *supra* note 13 and materials cited therein.

²⁰ In this context, it is noteworthy that the United States Department of Justice continues to investigate and prosecute anticompetitive restraints imposed by state professional licensing boards. See, e.g., *United States v. State Board of Certified Public Accountants of Louisiana*, Civ. No. 83-1947 (E.D. La. filed Apr. 15, 1983); *United States v. Alaska Board of Registration for Architects, Engineers and Land Surveyors*, No. A-82-423 CIF (D. Alaska filed Oct. 12, 1982).

²¹ While petitioners have not raised a jurisdictional challenge under the decision in *District of Columbia Court of Appeals v. Feldman*, ___ U.S. ___, 103 S. Ct. 1303 (1983), the National Conference of Bar Examiners and the State Bar of California, as *amici curiae*, made this argument in their briefs. However, the *Feldman* case does not provide a basis for denying jurisdiction in this case. Unlike the situation in *Feldman*, the complaint in this case attacks the grading system employed by the Arizona Committee on Examinations and Admissions. There is no basis for defining that grading system as a "judicial decision" as opposed to an administrative rule. In addition, the plaintiff in *Feldman* challenged a ruling of the highest court in the jurisdiction. To the contrary, this case involves a rule imposed by a subordinate board which was not authorized by the Arizona Supreme Court. Finally, it would not be reasonable to extend the *Feldman* rule to antitrust claims. Such a conclusion would result in a situation in which bar examiners, unlike the examiners of any other profession, are exempt from the proscriptions of the antitrust laws.

Arizona, 433 U.S. 350 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). As a result, the outcome of this case will decide whether all occupational licensing boards, not only bar examiners, will be required to obey the antitrust laws.

C. The Alleged Anticompetitive Conduct Was Not Clearly Articulated And Affirmatively Expressed In State Bar Admissions Policy, Nor Was It Clearly Necessary To Effect The State Policy Regarding Bar Admissions Established By The Arizona Supreme Court.

Applying the *Midcal* test to the conduct alleged in this case, it is clear that the Arizona Supreme Court has not established a clearly articulated and affirmatively expressed policy directing the Bar Examiners to establish a quota predicated on the need for additional members of the bar. *Cf. Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Benson v. Arizona State Board of Dental Examiners*, 673 F.2d 272 (9th Cir. 1982). It is equally clear that adjusting the grades on an examination to limit artificially the number of persons admitted to a profession is not necessary to achieve the public purpose of ensuring a minimum level of competence. Although there is some dispute as to the precise mandate²² of the Bar Examiners

²² In his complaint, respondent asserted that the Arizona Supreme Court had adopted a rule that the passing grade on the bar examination would be 70. (J.A. 9). Despite the fact that the Bar Examiners admitted that particular allegation in their answer to the complaint (J.A. 17), their argument to the court of appeals relied upon an amended version of the rule granting them general authority to examine bar applicants, and the court of appeals relied upon the amended rule in reaching its decision that the Bar Examiners' conduct was not exempt. The original rule specified that "[a]ll applicants who receive a grade of seventy or more . . . shall be recommended for admission to the Bar." Respondent's Brief App. at 6-7. The amended rule provides that the Admissions Committee "shall examine applicants and recommend to this court for admission to practice applicants

in this case, it is quite evident that they cannot point to any rule which would make their conduct necessary to effectuate state competition policy regarding bar admissions. In short, it is impossible to conclude that the Arizona Supreme Court contemplated, or intended to authorize, the adoption of a grading system based on the board members' considerations of the need for additional lawyers rather than the academic qualifications of the applicants.²³

Petitioners argue that since not all applicants are admitted, and the bar admissions process therefore necessarily restrains competition, the anticompetitive grading system allegedly employed by them is immune. However, as explained above, because all licensing procedures involve a certain degree of restraint, it is necessary to distinguish those restraints which are within

who are found by the Committee to have the necessary qualifications." Brief for petitioners at 7. The parties have not previously directly addressed the question of which rule was in effect at the time of the February 1974 bar examination. In his brief on the merits, respondent argues that the subsequent rule could not have been effective at the time of the February 1974 examination because it was not adopted more than sixty days before the examination. See *Ariz. Rev. Stat. Ann.* § 12-109(c) (1982).

²³ It is not difficult to formulate the type of expression of state policy which would have been sufficient to immunize the conduct of the Arizona Committee on Examinations and Admissions. The *amici* states suggest that a rather specific statement of policy indicating that the Committee was authorized to determine the number of applicants to be admitted on the basis of competitive concerns or the need for additional lawyers in the state would be sufficient to immunize the type of conduct alleged in this case. For example, if the supreme court had authorized the Bar Examiners to determine the number of new lawyers they believed the market could absorb and to manipulate the exam grades accordingly, the alleged conduct would be protected. While such a court rule might raise very troubling policy concerns, it would presumably result in antitrust immunity.

the scope of the board's authority from those which exceed its authority. To conclude, as petitioners' argument would suggest, that because the bar examination process is inherently anticompetitive, any restraints they impose must be immune, would be to grant members of licensing boards virtually unlimited power to control competition within their profession. Members of professions sitting on state licensing boards would be able to limit artificially the number of practitioners competing against them, based solely on their assessment of market conditions. They would be free to restrict the form and place of practice or to impose other restrictions which limit competition. Board members, as competitors, would be the direct beneficiaries of these restraints and the public purpose of licensing would be eroded. Reversal of the court of appeals' judgment in this case would produce such a result.

The State Bar of California and the National Conference of Bar Examiners, in their *amicus curiae* briefs, have characterized the grading system used by the Arizona Bar Examiners to limit the number of bar admittees as "scaled scoring" which these *amici* claim is needed to ensure uniform qualifications among applicants. "Scaled scoring" is a grading system under which a statistical analysis of examination answers is performed to make an adjustment for variance in the relative difficulty of different tests. However, while a system of "scaled scoring" may be appropriately used on the multiple choice Multistate Bar Examination,²⁴ these *amici* have not argued that this system is necessary or appropriate with respect to the subjective grading of the essay part of the bar examination

²⁴ *Amici* states are willing to assume that a statistical analysis such as "scaled scoring" in connection with a multiple choice test may be consistent with a bona fide attempt to determine objectively the qualifications of applicants.

at issue here.²⁵ Indeed, given the subjective nature of any essay examination with different questions and different graders, a statistical analysis of such an examination must be far different and more complex than that used for a multiple choice examination.

In sum, the *amici* states believe that serious competitive concerns may be raised when bar examiners purport to adjust essay examination grades to reflect their subjective views as to the relative difficulty of different examinations. Said differently, the bar examiners could be using grade adjustments as a device for manipulating passing grades for competitive reasons rather than to ensure uniform qualifications.²⁶

In order to maintain the integrity of occupational licensing and to ensure that those entrusted by states with the responsibility of performing the occupational licensing function adhere to the public interest goals set out for them, anticompetitive regulation by occupational licensing boards must be scrutinized carefully. The mere existence of a system of occupational licensing should not serve to immunize any and all anticompetitive conduct by an occupational licensing board. The specific authorization for anticompetitive conduct which is necessary in order to immunize the acts of a state board is absent in this case.

²⁵ One expert on bar examinations stated that he was not aware of any state which attempted to "equalize" the grades on its essay examination. Medlinsky, *Remarks*, in 49 Bar Examiner 59, 65 (1980).

²⁶ Because of the procedural posture of this case, very little factual analysis is possible. Details with respect to the use of "scaled scoring" or the precise methodology used by the Bar Examiners must, therefore, be reserved for a later stage of this litigation.

III. APPLYING THE ANTITRUST LAWS TO THIS CASE WILL NOT IMPOSE UNDUE BURDENS ON STATE BAR ADMISSIONS PROCEDURES.

The Bar Examiners and the two *amici* which have submitted briefs on their behalf have argued that denial of the state action exemption in this case would lead to a proliferation of antitrust claims against bar examiners, thereby interfering with the bar examination process, and unduly burdening the federal courts.²⁷ To the contrary, this case would not inevitably require that individual

²⁷ As *amici* states have pointed out, the denial of the state action exemption in this case would require all occupational licensing boards to obey the antitrust laws.

In addition to raising the question of the standard to be applied in scrutinizing the conduct of occupational licensing boards, this case also presents the difficult question of whether individual board members may be subject to individual antitrust liability. While it is somewhat troubling to conclude that individuals who serve on state boards as volunteers may be liable for damages under the antitrust laws, there is clearly precedent for such individual liability of government officials under the civil rights laws. The Court has developed a standard of "qualified immunity" for government officials in the civil rights area, but has consistently refused to extend absolute immunity on the basis of official status. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Wood v. Strickland*, 420 U.S. 308 (1975).

The same rationale supports the conclusion that state and local government officials may be individually liable for antitrust violations. In the area of trade regulation, the antitrust laws embody fundamental principles of free competition much as principles of individual liberties are embodied in the civil rights laws. Both the antitrust laws and the civil rights laws protect interests regarded as crucial to our system of government. Consequently, a compelling argument can be made that the same standards which determine the liability of officials for civil rights violations should be applied to officials who violate the antitrust laws. In developing those standards, the Court has accommodated the competing interests of immunizing government officials for conduct undertaken in their official capacity and of protecting fundamental national interests. This result is especially appropriate where personal as opposed to public motives can be attributed to the public officials' conduct.

grading decisions be reconsidered by federal courts. Rather, the decision below requires only that grading systems which incorporate admissions barriers not authorized by the state's policymakers are not exempt. Clearly, such unwarranted trade restraints are proper subjects for federal court consideration.

More importantly, petitioners' argument that avoidance of a proliferation of litigation justifies immunity must fail because it ignores the importance Congress has placed upon our national policy favoring free competition. In sum, this Court's answer to the same argument raised by political subdivisions in *Boulder* provides the most appropriate response:

[T]his argument is simply an attack upon the wisdom of the long-standing congressional commitment to the policy of free markets and open competition embodied in the antitrust laws. Those laws, like other federal laws imposing civil or criminal sanctions upon "persons," of course apply to municipalities as well as to other corporate entities. Moreover, judicial enforcement of Congress' will regarding the state-action exemption renders a State "no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anti-competitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." *City of Lafayette*, 435 U.S. at 416.

455 U.S. at 56-57 (footnotes omitted).

The Fifth Circuit Court of Appeals has recently granted rehearing of a decision which adopted this position and held the mayor of Houston individually liable for treble damages under the antitrust laws. *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226 (5th Cir.), *reh'g granted*, 1983-2 Trade Cas. (CCH) ¶65,597 (5th Cir. 1983).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

STEPHEN H. SACHS

Attorney General of Maryland
Counsel of Record

CHARLES O. MONK, II

Assistant Attorney General and
Chief, Antitrust Division

LINDA H. JONES

Assistant Attorney General

7 North Calvert Street
The Munsey Building
Baltimore, Maryland 21202
(301) 576-6470

Attorneys for State of Maryland

*(Additional counsel listed
inside front cover)*

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OF THE

United States

OCTOBER TERM, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN, ROBERT D. MYERS
and HAROLD J. WOLFINGER,
Petitioners,

vs.

EDWARD RONWIN,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for
the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICUS CURIAE
AND
BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

Of Counsel:

ALLAN ASHMAN

333 North Michigan Avenue,
Suite 1025
Chicago, IL 60601

JOHN E. HOLT-HARRIS, JR.

DEGRAFF, FOY, CONWAY,
HOLT-HARRIS & MEALEY
90 State Street
Albany, NY 12207

JAN T. CHILTON

SEVERSON, WERSON, BERKE
& MELCHIOR
A Professional Corporation
One Embarcadero Center,
25th Floor
San Francisco, CA 94111

KURT W. MELCHIOR

One Embarcadero Center,
25th Floor
San Francisco, CA 94111
(415) 398-3344

*Attorney for Amicus Curiae
National Conference of
Bar Examiners*

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The National Conference of Bar Examiners ("NCBE") moves for leave to file the attached Brief of Amicus Curiae in support of petitioners. Petitioners have consented to the filing of this amicus brief; respondent Ronwin has withdrawn his consent previously given.

The NCBE is a national service organization for bar examiners like the petitioners in this case. The NCBE has an organizational interest in this case because the holding below will have serious impact on the bar examining process and will create potential liability for the NCBE as the organization which prepares and scores the Multistate Bar Examination and the Multistate Professional Responsibility Examination.

With the court of appeals' permission, the NCBE filed amicus curiae briefs in support of each petitioners' two petitions for rehearing in that court, and with this Court's permission, the NCBE filed an amicus curiae brief in support of the petition for writ of certiorari.

In the attached amicus curiae brief, the NCBE demonstrates why this Court's recent decision in *District of Columbia Court of Appeals v. Feldman*, U.S., 103 S.Ct. 1303 (1983) prevents federal district courts from assuming jurisdiction over antitrust suits which, like Ronwin's, seek to attack collaterally the final judicial determination of a state's highest court in denying an applicant admission to practice law. Application of the *Feldman* holding to cases such as Ronwin's avoids a severe and unnecessary intrusion on the states' compelling interest in regulating the legal profession.

The attached amicus curiae brief also demonstrates that petitioners' acts were exempt from antitrust scrutiny under *Parker v. Brown*, 317 U.S. 341 (1943). The Arizona Committee on Examinations and Admissions acted as the state itself in its sovereign capacity and therefore was absolutely immune without meeting the twofold test restated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 455 U.S. 97, 105 (1980).

The amicus brief also discusses the proper application of the *Midcal* test to public entities, showing that such entities need not demonstrate that their actions were "compelled" by the state or were subject to "active state supervision." All a public entity must show to claim state action immunity is that its acts were the kind contemplated by its authorizing legislation. The committee's challenged acts met that test.

Finally, the attached amicus curiae brief shows that because the committee was purely an advisory body whose sole function was to examine applicants and recommend

that the Arizona Supreme Court grant admission to those applicants the committee found qualified, the committee's actions were also immune from antitrust scrutiny under the *Noerr-Pennington* doctrine.

Counsel for amicus contacted respondent before commencing work on this brief, and respondent at that time graciously consented to its filing. Recently, when work on the brief had been substantially completed, counsel for amicus wrote respondent, requesting the written consent letter required by this Court's Rule 36.2. Respondent then changed his mind, necessitating this application.

For all of these reasons, the NCBE respectfully requests that its motion for leave to file the attached brief of amicus curiae be granted.

DATED: August 15, 1983.

Respectfully submitted,

KURT W. MELCHIOR
One Embarcadero Center,
25th Floor
San Francisco, CA 94111
(415) 398-3344
*Attorney for Amicus Curiae
National Conference of
Bar Examiners*

Of Counsel:

ALLAN ASHMAN
333 North Michigan Avenue,
Suite 1025
Chicago, IL 60601

JOHN E. HOLT-HARRIS, JR.
DEGRAFF, FOY, CONWAY,
HOLT-HARRIS & MEALEY
90 State Street
Albany, NY 12207

JAN T. CHILTON
SEVERSON, WERSON, BERKE
& MELCHIOR
A Professional Corporation
One Embarcadero Center
25th Floor
San Francisco, CA 94111

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Amicus curiae, the National Conference of Bar Examiners("NCBE"), respectfully submits this brief in support of petitioners Charles R. Hoover, et al.

SUMMARY OF ARGUMENT

The regulation of attorneys lies at the core of the states' power to protect their citizens. The bar examination is an essential tool in the states' exercise of that power. In each state, the highest court retains the power to grant or deny admission to practice, but has delegated to a board of eminent practitioners the highly sophisticated, technical and time-consuming chores of preparing, administering and grading the bar examination.

Federal antitrust review of the bar examination grading process would serve no Congressional purpose. It would not open entry into the legal profession to free competition. It would, however, severely infringe upon the states' compelling interest in regulating their own bars. It would also impose significant additional litigation burdens on the federal courts.

These evils are avoided by following this Court's recent decision in *District of Columbia Court of Appeals v. Feldman*, U.S., 103 S.Ct. 1303 (1983). There, this Court held that the federal district courts lack jurisdiction to review individual denials of admission to practice because such denials are final judicial action reviewable only in this Court. Though *Feldman* concerned constitutional attacks on denials of admission, its reasoning applies with equal force to prevent federal district courts from entertaining similar collateral attacks by way of antitrust actions.

The district court was also correct in dismissing this action because it involves exempt state action. Restraints of trade imposed by the state itself, acting in its sovereign capacity, are immune from antitrust scrutiny. *Parker v. Brown*, 317 U.S. 341 (1943). For these purposes, any state body which makes decisions and sets policy for the state as a whole partakes to that extent of the state's sovereignty and is immune from antitrust attack. Pursuant to the Arizona Supreme Court's directions, the Arizona Committee on Examinations and Admissions set and implemented statewide policy on the administration and grading of bar examinations. It acted as the state itself and was absolutely immune.

The two-pronged test restated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) should not be applied to such state agencies. But to the extent that test is applied, it is met here.

The committee was duly authorized by the Arizona Supreme Court to grade bar examinations. The supreme court necessarily contemplated that the committee would

choose a particular method of grading, the kind of activity challenged here. Whatever method was chosen, the result would restrain trade by excluding those receiving low grades from admission to practice. That is all that is required to show a clearly articulated and affirmatively expressed state policy, at least when a public agency's acts are attacked.

A public agency, particularly a state agency, should not have to show that its acts were actively supervised by the state. But if that requirement must be met, the Arizona Supreme Court's review and supervision of the committee's work does so.

Finally, the *Noerr-Pennington* doctrine shields the committee's acts from antitrust review. The committee's only function was to recommend to the Arizona Supreme Court that the court grant or deny admission to particular applicants. Such initiation of judicial action is not proscribed by the antitrust laws.

For all of these reasons, the district court correctly dismissed the complaint in this action. Its judgment should be reinstated and the erroneous judgment of the Ninth Circuit Court of Appeals should be reversed.

INTEREST OF AMICUS CURIAE

Organized in 1931, the NCBE is a private, nonprofit corporation affiliated with the American Bar Association. The NCBE's membership includes officers and members of boards of bar examiners and of bar character committees of all 50 states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands. The NCBE's membership also includes judges of state courts which control admission of lawyers to practice.

Among the NCBE's objectives are improving the quality of bar examinations, conducting studies and distributing information about bar examinations, and encouraging the maintenance of high standards by state boards of bar examiners. The NCBE also cooperates with other organiza-

tions representing the bench, bar and law schools in solving problems relating to legal education and bar admissions.

In cooperation with the American Bar Association and the American Association of Law Schools, the NCBE has promulgated a Code of Recommended Standards for Bar Examiners. The Code's 29 standards cover all aspects of bar examinations, from who should serve as a bar examiner to how bar examinations should be graded.

The NCBE has published *The Bar Examiners' Handbook* (S. Duhl 2d ed. 1980) which provides extended commentary on each of the 29 Recommended Standards for Bar Examiners. The NCBE also publishes a monthly periodical, *The Bar Examiner*, featuring articles by eminent authorities on admission standards and bar examination procedures, and a *Litigation Report*, detailing the progress of and analyzing the issues in litigation against bar examiners. The NCBE holds conventions, seminars and other instructional sessions for bar examiners and judges.

The NCBE maintains a library of more than 6,500 bar examination essay questions. On request, the NCBE sends questions and model answers to bar examiners throughout the nation for use in preparing bar examinations.

Since 1971, the NCBE has compiled, administered and scored the Multistate Bar Examination ("MBE"). The MBE is a multiple choice examination containing 200 questions covering contracts, torts, constitutional law, criminal law, evidence and real property. At present, 46 states, the District of Columbia and the Virgin Islands use the MBE as part of their bar examinations.

The NCBE has recently established the Multistate Professional Responsibility Examination ("MPRE"). First given in 1980, the MPRE is now used in 27 jurisdictions. The MPRE is a 50-question multiple choice test on legal ethics.

The NCBE has an organizational interest in this case because antitrust review of the grading of bar examinations

will interfere with the NCBE's goals of improving the quality of bar examinations and of encouraging the maintenance of high professional standards among bar examiners. NCBE also has an interest in the application of the antitrust laws to bar examiners, both on behalf of its bar examiner members and in its own right as the organization which prepares and scores the MBE and MPRE.

ARGUMENT

1. **A Federal Antitrust Action Cannot be Used to Challenge a Failing Grade on a Bar Examination**
 - a. **The States Have a Compelling Interest in Regulating Admission to Their Bars**

Time and again, this Court has "recognize[d] that the states have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

The states' interest "in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' [Citations.]" *Ibid*. Indeed, this Court has held that the "regulation of the activities of the bar is at the core of the State's power to protect the public." *Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977); accord: *District of Columbia Court of Appeals v. Feldman*, *supra*, 103 S.Ct. at 1315-1316 n. 16; *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, U.S., 102 S.Ct. 2515, 2522-2523 (1982).

Federal intrusions into this area of critical state concern have intentionally been few in number and limited in scope. See, e.g., *Konigsberg v. State Bar of California*, 353

U.S. 252, 273 (1957); *In re Summers*, 325 U.S. 561, 570-571 (1945). It remains true that

Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.

Fn. omitted; *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

Though this Court has reviewed other aspects of bar admissions from time to time, this case is the first to present bar examination procedures for this Court's review.

b. The Bar Examination Is an Essential Tool in Regulating Admission to Practice

The bar examination is an essential tool in the states' regulation of admission to the bar. Though "[t]he bar examination seems to be a favorite whipping boy of critics of the system," F. Klein, S. Leleiko & J. Mavity, *Bar Admission Rules and Student Practice Rules*, 39 (1978) (hereafter "*Bar Admission Rules*"), no one has yet suggested a satisfactory alternative to the bar examination for evaluating an applicant's knowledge of the law, ability to analyze legal problems and aptitude for the practice of law. See O'Hara & Klein, *Is the Bar Examination an Adequate Measure of Lawyer Competence?*, 50 *Bar Examiner* 28 (1981).

Oral bar examinations predate this nation, and written bar examinations were given as early as 1855. Sprecher, *Fifty Years of Service*, 50 *Bar Examiner* 4 (1981); Karger, *The Role of the NCBE in the Bar Admission Process: Its First Fifty Years*, 50 *Bar Examiner* 7, 8-9 (1981). By now, written bar examinations are the primary tool for screening bar applicants in all 50 states. Karger, *supra*, 50 *Bar Examiner* at 9; *Bar Admission Rules*,

34-36. The Devitt Committee has recommended that a federal bar examination be instituted as one means of improving and assuring the quality of legal representation in the federal courts. *Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts* (1979), reprinted at 83 F.R.D. 215, 224-225 (hereafter "Final Report").

Over the past 50 years, under the NCBE's leadership, the preparation, grading and administration of bar examinations have become increasingly sophisticated. See *Karger, supra*, 50 Bar Examiner at 9-14. At the same time, the complexity of those tasks has vastly increased, together with the number of applicants taking bar examinations. *The Bar Examiners' Handbook*, 312 (S. Duhl 2d ed. 1980); Smith, 1981 *Bar Examination Statistics*, 51 Bar Examiner 27 (1982); see Covington, *The Preparation and Operation of the Multistate Bar Examination*, 50 Bar Examiner 20 (1981); Covington, *Administering the Multistate Professional Responsibility Examination*, 50 Bar Examiner 26 (1981). As a result, though each state's highest court retains the ultimate authority to grant or deny admission to practice, each has delegated to a committee, commission or board of bar examiners the duties of preparing, grading and administering the bar examination. *Bar Admission Rules*, 29-33.

These bar examiners are skilled practicing attorneys "with scholarly attainments and an affirmative interest in legal education and requirements for admission to the bar." *The Bar Examiners' Handbook*, at 95. In general, these eminent practitioners volunteer their time and expertise to assist the states' highest courts perform an essential, but time-consuming and technical task, which those courts could not otherwise accomplish. See *id.*, at 99.

Bar examiners bring a high degree of professionalism to their task. *The Bar Examiners' Handbook*, at 95-97. Since 1958, they have operated under a Code of Recommended Standards for Bar Examiners promulgated by the NCBE

in cooperation with the American Bar Association and the Association of American Law Schools. Karger, *supra*, 50 Bar Examiner at 9-10. That Code has recently been revised and republished with extensive commentary as *The Bar Examiners' Handbook* (S. Duhl 2d ed. 1980). *Id.*, 11-12. The Code specifies standards on all aspects of the bar examination process, including the grading of bar examinations and the provision of review procedures for disappointed applicants. *The Bar Examiners' Handbook*, at 271-302, 303-309. Through these means, bar examiners have imposed on themselves a high degree of self-regulation.

In addition, bar examiners are subject to the scrutiny, supervision and direction of the states' highest courts. Before bar examinations are given, the high courts supervise the preparation of the tests and the grading procedures to be employed. *See, e.g.*, Ariz.Sup.Ct.R. 28(c) (VII) (B) (except as otherwise noted all references are to the rules in effect in February 1974). After bar examinations are given, the high courts again exercise their control and supervision by exercising their discretion *de novo* in granting or denying admission to applicants, *see, e.g.*, Ariz.Sup.Ct.R. 28(a); *Application of Levine*, 97 Ariz. 88, 397 P.2d 205, 207 (1964), and by providing explicit procedures for review, ultimately by the high court itself, of a disappointed applicant's failing grade, *The Bar Examiners' Handbook*, at 303-309; *Bar Admission Rules*, 34-36, 40; *see, e.g.*, Ariz.Sup.Ct.R. 28(c)(XII)(G) (amended effective June 15, 1976). This is judicial action. *See* pp. 12-14, *infra*.

c. Federal Antitrust Review of Bar Examinations Would Disrupt the Bar Examination Process and Unwisely Shift Control Over Bar Admissions to the Federal Courts

The bar examination process now runs relatively smoothly along the lines discussed above. That process will

be severely disrupted if disappointed applicants are allowed to challenge their failing grades in federal antitrust actions like Ronwin's.

As Ronwin, himself, illustrates, disappointed bar applicants can be tireless litigants. See *Ronwin v. Committee on Examinations and Admissions*, 419 U.S. 967 (1974); *Application of Ronwin*, 113 Ariz. 357, 555 P.2d 315 (1976), *cert. denied*, 430 U.S. 907 (1977), 439 U.S. 828 (1978); *Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981); see also, *In re Ronwin*, Ariz., P.2d, Nos. SB52-8, SB52-9 (July 6, 1983); *Ronwin v. Segal*, 634 F.2d 636 (9th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Ronwin v. Fair Employment Practices Comm'n*, 409 U.S. 811 (1972).

Disappointed bar applicants will have little trouble framing a Sherman Act complaint which will survive a motion to dismiss, unless such actions are barred by the state action or *Noerr-Pennington* doctrines discussed below. By its very nature, the bar examination process involves the exercise of discretion and excludes some would-be competitors from competition. Since bar examiners are practicing lawyers, it is easy to blame such exclusion on the bar examiners' supposed anticompetitive motives. Compl., ¶ VII.

Nor will it be possible to weed out many of these complaints by summary judgment, *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962), particularly since anticompetitive motive may be inferred from anticompetitive effect, *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317, 1321 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976). Antitrust litigation is notoriously expensive to defend, normally involving copious discovery. See Herndon, et al., *Expediting and Controlling Antitrust Litigation—The Demand for Cost Containment*, 51 Antitrust L.J. 423 (1983); E. Timberlake, *Federal Treble Damage Antitrust Actions*, § 1.03, p. 2 (1965).

Even if bar examiners were to prevail at trial in each Ronwin-style antitrust action, the bar examination process

would be severely disrupted. The cost of defending such actions, the threat of liability for treble damages and attorneys' fees, the inconvenience and loss from having to spend long hours in depositions, answering interrogatories and preparing defenses would all serve to deter eminent practitioners from serving as bar examiners. Bar examiners might prevail at trial, "[b]ut in the meantime the antitrust suit will have strategic effects, will impose discovery and litigation burdens, and may intimidate public officials in the performance of their duties—all on the basis of the conclusory allegations common in such cases." Areeda, *Antitrust Immunity for "State Action" after Lafayette*, 95 Harv.L. Rev. 435, 451 (1981).

Antitrust review of bar examination grading would also improperly shift the ultimate responsibility for bar admissions from the states to the federal courts. See pp. 24-26, *infra*. Federal judges and juries, not the justices of the states' highest courts, would be the final arbiters of who should be admitted to practice. Moreover, admissions decisions would depend, in the end, on antitrust concepts, not the quite different concerns of quality, competence, and protection of the public which the bar examinations process now serves.

Allowing antitrust challenges to failing grades on the bar examination would impose significant burdens on the federal courts. If only ten percent of those who failed bar examinations filed antitrust actions, another 2,000 cases would be added each year to the federal courts' already overburdened dockets.¹

In addition, the federal courts would face a rising tide of antitrust claims by disappointed applicants for the many other types of professional licenses issued by state regulatory boards commonly composed of members of the regulated profession. See, e. g., *Gambrel v. Kentucky Bd. of Dentistry*, 689 F.2d 612 (6th Cir. 1982), *cert. denied*,

¹In 1981, 20,219 applicants took and failed bar examinations in American jurisdictions. Smith, *supra*, 51 Bar Examiner, at 27.

U.S., 103 S.Ct. 1198 (1983); *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992 (3d Cir.), *cert. denied*, U.S., 103 S.Ct. 388 (1982); *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272 (9th Cir. 1982).

Antitrust review would constitute a substantial federal intrusion upon the states' "compelling interest" in regulation of admission to the practice of law. In *Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. at 793, this Court observed that "[i]n holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions." As in *Bates v. State Bar of Arizona*, *supra*, 433 U.S. at 360 n. 11, "[a]llowing the instant Sherman Act challenge to [bar examination grading] would have precisely that undesired effect."

Allowing actions like Ronwin's would not measurably advance antitrust objectives. Admission to state bars is not and should not be determined by economic forces. To protect the public from incompetent would-be lawyers, every state has displaced "unfettered economic freedom," *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978), with regulation of admission to practice in order to weed out unqualified applicants. *Bar Admission Rules*, at pp. 34-36. The trend is toward tighter regulation, not more economic freedom. See, e.g., Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 Fordham L.Rev. 227 (1973); Burger, *Some Further Reflections on the Problems of Adequacy of Trial Counsel*, 49 Fordham L.Rev. 1 (1980); *Final Report*, *supra*, 83 F.R.D. at 224-225.

Antitrust review of bar examination grading will not reverse that anticompetitive trend toward better screening of bar applicants in order to protect courts and clients. Antitrust review will impose undesirable new burdens on the federal courts, intrude upon the states' exclusive prerogatives in regulating admission to their bars, and seriously disrupt the bar examination process.

**d. District of Columbia Court of Appeals v. Feldman
Bars Individual Antitrust Challenges to Failing
Bar Examination Grades**

This Court's recent decision in *District of Columbia Court of Appeals v. Feldman*, *supra*, 103 S.Ct. 1303 provides a clear path to the resolution of this suit and avoidance of the problems which federal antitrust review of state bar admissions decisions would entail.

In *Feldman*, this Court held that denial of admission to practice is a final judgment of the state's highest court, a judicial act. *Id.*, at 1311-1314. Such judgments are reviewable only in this Court. The federal district courts lack subject matter jurisdiction to review such judgments. They have no power to entertain complaints seeking to compel an individual's admission to practice law. *Id.*, at 1311, 1314 n. 15, 1315; *see* n. 2, *infra*, re court of appeal ruling on Feldman's antitrust claims.

According to *Feldman*, a disappointed bar applicant must raise even a constitutional attack in the state court to preserve the point for possible review by this Court. "By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court." *Id.*, at 1315 n. 16.

The same reasoning applies with equal force to prevent federal district courts from entertaining antitrust complaints like Ronwin's. Ronwin seeks collateral review of the Arizona Supreme Court's decision denying him admission to practice. His complaint alleges that as a result of defendants' alleged antitrust violation, he was artificially prevented from entering competition as an Arizona lawyer and thus suffered \$400,000 damages. Compl., ¶¶VII, IX.

Nothing barred Ronwin from raising this antitrust claim as part of his initial state court challenge to his failing grade. *See Ronwin v. Committee on Examinations and Admissions*, 419 U.S. 967 (1974). *District of Columbia Court of Appeals v. Feldman*, *supra*, 103 S.Ct. at 1306-1307, 1313

n. 14 and *Bates v. State Bar of Arizona*, *supra*, 433 U.S. at 356-357 demonstrate that antitrust objections can and should be raised in the course of any state court challenge to an admission or disciplinary ruling.² By failing to raise

²Federal district courts have exclusive jurisdiction over private treble damage actions under the federal antitrust laws. 15 U.S.C., § 15. But, as *Feldman* and *Bates* show, that does not prevent state courts from considering federal antitrust claims in deciding whether to admit or discipline members of their bars. See also, *Lynch Display Corp. v. National Souvenir Center, Inc.*, 640 S.W.2d 837 (Tenn.Ct.App. 1982). In the same way, it has long been held that federal regulatory agencies can and must consider the antitrust implications of their actions. See, e.g., *Denver & R.G. R.R. Co. v. United States*, 387 U.S. 485, 492-498 (1967); *California v. Federal Power Comm'n*, 389 U.S. 482 (1962).

Requiring antitrust challenges to admission or disciplinary decisions to be raised in state court proceedings would allow the state supreme courts to avoid unintended anticompetitive effects of their decisions or rules. It would also permit those courts to clearly articulate state policy on the anticompetitive effects they do intend. Compare *District of Columbia Court of Appeals v. Feldman*, *supra*, 103 S.Ct. at 1315 n. 16. Requiring such issues to be raised in state court would also obviate the otherwise difficult question of an appropriate remedy, assuming an antitrust violation were found. See, *Community Communications Co. v. City of Boulder*, ... U.S. ..., 102 S.Ct. 835, 843 n. 20 (1982); I P. Areeda & D. Turner, *Anti-trust Law*, ¶ 217a, pp. 101-108 (1978).

The seemingly contrary holding in *Feldman v. Gardner*, 661 F.2d 1295, 1303 (D.C.Cir. 1981), *cert. denied*, ... U.S. ..., 102 S.Ct. 3483 (1982), *rev'd on other grounds sub nom.*, *District of Columbia Court of Appeals v. Feldman*, *supra*, was made without benefit of this Court's reasoning in *District of Columbia Court of Appeals v. Feldman*, *supra*, and appears to depend in large part on the same rationale this Court later rejected with respect to *Feldman*'s constitutional claims. Compare 661 F.2d at 1303 n. 61 with 661 F.2d at 1309-1319.

Having incorrectly held that the district court had jurisdiction to hear *Feldman*'s antitrust claims, the court of appeals correctly found that the District of Columbia Court of Appeals acted as the state itself in promulgating and enforcing its rules governing bar admissions, and was therefore entitled to state action immunity

his antitrust claim in the Arizona Supreme Court, Ronwin lost his right to federal court review of that claim.

Any different holding would allow disappointed bar applicants an easy escape from *Feldman's* rule that the federal district courts are without jurisdiction to review a final order of a state supreme court denying a particular applicant admission to the bar. *Feldman, supra*, 103 S.Ct. at 1316. Any would-be lawyer could secure collateral review in the district court by the simple means of phrasing his claim in antitrust terms rather than constitutional language. Surely, *Feldman* was not intended to be limited to such niceties of pleading.

In short, *Feldman* points the way to a proper reconciliation of the states' compelling interest in regulation of admission to the practice of law with the federal antitrust laws. A bar applicant who claims he was denied admission due to some unauthorized anticompetitive practice may raise his claim before the state's highest court on review of the denial of his admission. If the state court finds that the applicant was the victim of an unauthorized anticompetitive practice, it will presumably order the applicant's admission, or this Court may do so on direct review.

A later federal antitrust action will be precluded. The disruptive effects of antitrust review of state bar admissions decisions by lower federal court judges and juries will be avoided.

2. Grading Bar Examinations Is State Action Exempt From Antitrust Scrutiny

a. The Committee on Examinations and Admissions Acted as the State in Its Sovereign Capacity and Therefore Is Exempt

This Court has repeatedly held that the Sherman Act does not prohibit restraints of trade imposed by the State itself.

from the antitrust laws. 661 F.2d at 1304-1318. This Court denied *Feldman's* petition for certiorari from this holding. *Feldman v. District of Columbia Court of Appeals*, ... U.S. ... , 102 S.Ct. 3483 (1982).

Parker v. Brown, *supra*, 317 U.S. at 350-352; *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, *supra*, 439 U.S. at 109; *Bates v. State Bar of Arizona*, *supra*, 433 U.S. at 359-360.

This "state action exemption" arises from our "dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority." *Parker v. Brown*, *supra*, 317 U.S. at 351; *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978). In other words, the "Parker exemption reflects the federalism principle that we are a nation of *States* . . ." *Community Communications Co. v. City of Boulder*, *supra* n. 2, 102 S.Ct. at 840.

Because of its fundamental, federalist nature, the *Parker* exemption absolutely immunizes from antitrust attack all acts taken by a state acting in its sovereign capacity. Such sovereign acts need not meet the two-pronged test articulated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, *supra*, 445 U.S. at 105.³ *Community Communications Co. v. City of Boulder*, *supra*, 102 S.Ct. at 841; *Parker v. Brown*, *supra*, 317 U.S. at 350-352; accord *Feldman v. Gardner*, *supra* n. 2, 661 F.2d at 1305; *Foley v. Alabama State Bar*, 648 F.2d 355, 359 (5th Cir. 1981); *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363, 372 (9th Cir. 1974).

Instead, the *Midcal* test is applied only to municipalities, private persons and others who are not the state and thus cannot act in a sovereign capacity.⁴ The *Midcal* test recog-

³As restated in *Midcal*, the test is "[f]irst, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, *supra*, 445 U.S. at 105.

⁴The fact that the committee's members are lawyers, that is, members of the regulated industry, and serve on the committee only on a part-time basis does not deprive their acts of state action immunity. In *Parker*, the program committees which established

nizes "that a State may frequently choose to effect its policies through the instrumentality of [such non-state entities]." *Community Communications Co. v. City of Boulder*, *supra*, 102 S.Ct. at 840. At the same time, the *Midcal* test assures that "[t]he national policy in favor of free competition cannot be thwarted by casting . . . a gauzy cloak of state involvement over what is essentially a private price fixing arrangement." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, *supra*, 445 U.S. at 106.

Thus, as this Court most recently summarized in *Community Communications Co. v. City of Boulder*, *supra*, 102 S.Ct. at 841, the *Parker* exemption is available to a state whenever it acts as sovereign, but to other entities only when their acts meet the *Midcal* test:

Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny *unless it constitutes the action of the State of Colorado itself in its sovereign capacity*, see *Parker*, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy [citations].

Emphasis added.

This Court's state action cases have not, as yet, squarely addressed the question whether state sovereignty resides in less than all of the many officers and entities of which modern state governments are composed. *See Areeda*,

the prorate program, the particular restraint of trade under attack, were likewise composed of producers and packers, members of the regulated industry. 317 U.S. at 346. In *Orrin W. Fox Co.*, the state required four of the nine members of the New Motor Vehicle Board to be car dealers, members of the regulated industry. Cal. Veh.Code, § 3001. As this Court said in *Goldfarb v. Virginia State Bar*, *supra*, in *City of Lafayette v. Louisiana Power & Light Co.*, *supra*, 435 U.S. at 411 n. 41: "[T]he fact that the ancillary effect of the State Bar's policy, or even the conscious desire on its part, may have been to benefit the [member-]lawyers it regulated cannot transmute the State Bar's official actions into those of a private organization."

supra, 95 Harv.L.Rev. at 441-442. Nevertheless, this Court's decisions suggest that the proper answer is that sovereignty resides in all parts of state government which make decisions and set policy for the state as a whole, including, in this case, the Arizona Committee on Examinations and Admissions.

Parker itself points the way. That case involved three levels of California state government. The state legislature enacted the Agricultural Prorate Act. Under the act, a statewide Agricultural Prorate Advisory Commission was established. Finally, upon petition by agricultural producers, a program committee of such producers and as many as two packers could be formed. 317 U.S. at 344, 346-347. The program committee would propose a prorate program. If approved by the Prorate Advisory Commission and a referendum of affected producers, the program would go into effect under the administration of the program committee. *Id.* at 347.

In *Parker*, the state legislature set the overall policy of excluding competition from selected agricultural markets, but the program committees, subordinate state administrative agencies composed of members of the regulated industry, decided upon and enforced the particular restraints of trade which Brown challenged. This Court held the trade restraints immune from antitrust scrutiny, finding that "in adopting and enforcing the prorate program," the state "as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.* at 352.

Likewise, in *New Motor Vehicle Board v. Orrin W. Fox Co.*, *supra*, 439 U.S. at 109-110, this Court held that the state action exemption applied to actions of the California New Motor Vehicle Board, a subordinate state administrative agency, four of whose nine members were from the regulated industry. The board established specific trade

restraints under an extremely general delegation of power from the California Legislature. *See id.*, at 98 n. 1.

This Court has also recognized in other contexts that sovereignty resides not only in a state's legislature, governor and supreme court, but in its subordinate administrative agencies as well. Speaking of the Mississippi Public Services Commission, this Court recently held:

We acknowledge that "the authority to make . . . fundamental . . . decisions" is perhaps the quintessential attribute of sovereignty. [Citation.] Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 360 It would follow that the ability of a state legislative (or, as here, administrative) body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State's role in the federal system.

Federal Energy Regulatory Comm'n. v. Mississippi, U.S., 102 S.Ct. 2126, 2138 (1982).

These decisions teach that state sovereignty is not isolated at the highest legislative, executive and judicial levels of government. If an arm of state government makes decisions and sets policy for the state as a whole, it acts to that extent as the state itself in its sovereign capacity.

In this case, the Arizona Committee on Examinations and Admissions partook of Arizona's sovereignty. The committee was created by the Arizona Supreme Court, the state's highest judicial authority, and is directly responsible to that body. *Ariz.Sup.Ct.R.* 28(a). The committee is an administrative aid to the court, helping it perform the judicial task of granting or denying admission to practice. *See Richardson v. McFadden*, 563 F.2d 1130, 1132 (4th Cir. 1977) (Hall, J., concurring), *cert. denied*, 435 U.S. 968 (1978); *Feldman v. State Board of Law Examiners*, 438 F.2d 699, 702 (8th Cir. 1971). The committee carries out

testing functions which the supreme court has neither the time nor the technical skills to perform itself.⁵

Within the narrow realm of its competence—preparation, administration and grading of the bar examination—the committee makes decisions and sets statewide policy. As in *Parker*, the highest level of state government has adopted the overall policy of removing a segment of commerce from free competition—here, entry into the legal profession—and has delegated to a lower state agency the job of developing the particular regulations (or restraints of trade) needed to carry the overall policy into effect.⁶ Ariz.Sup.Ct.R. 28(a), (c).

⁵In California, for example, the Committee of Bar Examiners administered 12,370 examinations in 1982. Smith, 1982 *Bar Examination Statistics*, 52 Bar Examiner 24 (1983). A study of the California committee concluded that in 1977 (when considerably fewer applicants took the examination), the committee handled 2.3 million separate transactions. Booz, Allen & Hamilton, Inc., *A Diagnostic Study of the Operations of the Offices of the Committee of Bar Examiners The State Bar of California* (March 1978). California's seven supreme court justices could not perform their many other judicial responsibilities if they participated personally in any significant way in this vast effort.

⁶The fact that both the overall anticompetitive policy and the particular trade restraints here were set by state agencies distinguishes this case from *Goldfarb v. Virginia State Bar*, *supra*. In *Goldfarb*, the Virginia Supreme Court had not adopted an anticompetitive policy in the pricing of legal services. To the contrary, its ethical codes directed that lawyers not be controlled by fee schedules. 421 U.S. at 789 & n. 19. The fee schedules *Goldfarb* struck down were "essentially a private anticompetitive activity" of the County Bar, a voluntary organization. *Id.*, at 790, 792. The State Bar, a state agency for some limited purposes, enforced this essentially private restraint which had not been authorized, reviewed or approved by the state. *Id.*, at 791.

Goldfarb was thus similar to *Midcal* and *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384 (1951). In those cases, state bodies enforced uniform resale prices set by private parties, and this Court held there was no state action immunity. By contrast, here the alleged trade restraint—the method of scoring the bar exami-

As *Parker and Orrin W. Fox Co.* hold, under such circumstances the acts of the lower state agency are those of the state itself acting as sovereign and are immune from the antitrust laws.

b. If the Midcal Test Applies, the Committee's Acts Meet It

Assuming *arguendo* that the Committee on Examinations and Admissions cannot claim state action immunity simply on the ground that it was acting as the state in its sovereign capacity, its acts are still immune because they satisfy the *Midcal* test as that test is applied to state agencies.

(1) The Committee Acted Pursuant to an Affirmatively Expressed State Policy

In determining whether private parties are entitled to state action immunity, this Court has required that "the challenged restraint . . . be 'one clearly articulated and affirmatively expressed as state policy'" *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, *supra*, 445 U.S. at 105.

In this case, the court of appeals held that the Arizona Committee on Examinations and Admissions had not met this part of the *Midcal* test because "the defendants here have no statute or Supreme Court Rule to point to as *directly requiring* the challenged grading procedure." *Fn. omitted*; emphasis added; 686 F.2d at 696. The court of appeals also held that the Arizona Supreme Court's delegation to the committee of general authority to examine applicants and the high court's review of the committee's recommendations regarding admission "does not alone clothe the Committee's unilateral grading policies with blanket immunity from the antitrust laws." *Ibid.*

nation—was established as well as enforced by the Committee on Examinations and Admissions acting in its official capacity as a state agency. That trade restraint was not "essentially private," but was a necessary step in accomplishing the state's regulatory purpose.

These holdings disclose a two-fold misunderstanding of the first part of the *Midcal* test, at least as it applies to governmental entities. First, in *City of Lafayette* and *City of Boulder*, this Court held that for a municipality's acts to be immune, they need not be compelled or "directly required" by state policy. Immunity attaches so long as it is shown that "the State authorized or directed a given municipality to act as it did. . . ." Emphasis added; *City of Lafayette v. Louisiana Power & Light Co.*, *supra*, 435 U.S. at 414, 416; *Community Communications Co. v. City of Boulder*, *supra*, 102 S.Ct. at 843-844; *Gold Cross Ambulance v. City of Kansas City*, 705 F.2d 1005, 1012 n. 11 (8th Cir. 1983); *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 381-382 (7th Cir. 1983), *petition for cert. filed*, 51 U.S.L.W. 3842 (U.S. May 11, 1983) (No. 82-1832); *United States v. Southern Motor Carriers Rate Conference*, 672 F.2d 469, 473 (5th Cir. 1982). *A fortiori*, a state agency need only be authorized, not required, to impose a restraint in order for state action immunity to attach.

Second, the Ninth Circuit's opinion in this case mistakenly requires "the state" to direct specifically the particular restraint under attack. *City of Lafayette* and *City of Boulder* show that such specificity is not required.

This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. While a subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." [Citation.]

Fn. omitted; *City of Lafayette v. Louisiana Power & Light Co.*, *supra*, 435 U.S. at 415; *accord: Community Communications Co. v. City of Boulder*, *supra*, 102 S.Ct. at 840 n. 12; *Town of Hallie v. City of Eau Claire*, *supra*, 700 F.2d at 381; *Euster v. Eagle Downs Racing Ass'n*, *supra*, 677 F.2d at 995; *see Areeda*, *supra*, 95 Harv.L. Rev. at 445-446.'

Here, the Arizona Supreme Court plainly "contemplated the kind of activity complained of." *See Benson v. Arizona State Bd. of Dental Examiners*, *supra*, 673 F.2d at 275-276. It directed the committee to "examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications." Ariz.Sup.Ct.R. 28(a). The committee's broad authority to examine applicants was restricted only

"To require "the state" to specifically authorize each particular trade restraint, as the Ninth Circuit did in this case, would impose an impossible burden on state government, effectively preventing its legislature, governor and supreme court from delegating their functions. The courts have often recognized that modern government, state or federal, depends upon delegation to subordinate agencies under broadly phrased mandates. *See, e.g., Lichter v. United States*, 334 U.S. 742, 785 (1948); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1934); *Horseman's Benevolent & Protective Ass'n v. Pennsylvania Horse Racing Comm'n*, 530 F.Supp. 1098, 1107-1108 (E.D.Pa. 1982), *aff'd per curiam*, 688 F.2d 821 (3d Cir. 1982). The Ninth Circuit's specific authorization requirement would prohibit such delegation.

Moreover, "the state" could not specifically authorize each potentially anticompetitive act of its subordinate agencies. The hair could always be split finer. Here, for example, following Ronwin's lead, another disappointed bar applicant could claim that the questions on the examination were selected for an unauthorized anticompetitive purpose or that particular answers were given lower grades for the same reason. To meet such claims, the Arizona Supreme Court presumably would have to specifically authorize each of those and a myriad of other details of the tasks it now delegates to the Committee on Examinations and Admissions.

by a rule specifying the subjects the bar examination should cover. Ariz.Sup.Ct.R. 28(c)(VII).

The supreme court contemplated that the committee would devise some method for scoring the bar examination; that is, of converting answers into "grades." Ariz. Sup.Ct.R. 28(c)(VII)(A). Whatever method the committee chose, it would exclude some would-be competitors from the market. See *Galahad v. Weinshienk*, 555 F.Supp. 1201, 1209 (D.Colo. 1983). Whatever the scoring method, those receiving lower grades would not be recommended for admission to practice.

Ronwin complains that the scoring method the committee chose—so-called scaled scoring⁸—was not the scoring method the Arizona Supreme Court intended. Compl., ¶ VI; Brief in Opposition to Petition for Certiorari, 9-12, 22. Ronwin is wrong for two reasons.

He incorrectly assumes that the supreme court specified a particular method of grading the bar examination. It did not. Ronwin relies on a version of rule 28(c)(VIII) which was superseded effective January 14, 1974, a month before he took and failed the examination. Even the superseded rule merely said 70 would be a passing grade, specifying neither the 0-100 grading scale Ronwin claims, nor the method for determining what grade to give an examina-

⁸"In a series of tests, such as the MBE, which are intended to measure levels of competence, it is important to have a standardized score which represents the same level of competence from test to test. The raw score is not dependable for this purpose since the level of difficulty varies from test to test. It is not possible to draft two tests of exactly the same level of difficulty. Scaled scores are obtained by reusing some questions from earlier tests which have been standardized. A statistical analysis of the scores on the reused questions determines how many points are to be added to or subtracted from the raw score to provide an applicant's scaled score. Thus a particular scaled score represents the same level of competence from examination to examination."

The Bar Examiners' Handbook, *supra*, 61-62.

tion.⁹ The new rule 28(c)(VII)(A) explicitly grants the committee discretion to use the grading or scoring system it deems appropriate. See n. 9 *supra*.

More importantly, Ronwin's complaint that the committee abused its discretion by choosing the wrong scoring method does not convert exempt state action into private action subject to antitrust scrutiny. The antitrust laws were not passed to allow federal courts to review state administrative actions for abuse of discretion.

To be sure, *Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. at 790-791 holds that anticompetitive activity not "required" or "compelled" by "the State acting as sovereign" is not exempt from the Sherman Act. But it could not have been *Goldfarb's* intent to exempt only state administrative decisions which federal scrutiny finds to be honest, unbiased, disinterested and correct in law and fact. To limit *Parker* immunity so narrowly would be to "transform most state administrative law into a federal antitrust task," making federal courts the ultimate arbiters of whether state agencies have properly implemented the policies set by state legislatures, governors and supreme courts. Areeda, *supra*, 95 Harv.L.Rev. at 450.

Having one sovereign review another in this manner would violate the federalist underpinning of *Parker*. It

⁹Grading a bar examination is not a simple process of counting the number of "correct" answers and dividing by the number of questions. Even on the multiple choice Multistate Bar Examination portion of the test, grading is considerably more complex. Scoring answers to essay questions is even more difficult, and combining the two scores in a meaningful way adds yet another layer of complexity to the process of grading the bar examination. See, *The Bar Examiners' Handbook*, *supra*, 271-302.

Recognizing these facts, the Arizona Supreme Court amended its rules 28(c)(VII) and (VIII) to make explicit what was implicit before. Effective January 14, 1974, rule 28(c)(VII) provided: "The Committee on Examinations may utilize the Multi-State Bar Examination sponsored by the National Conference of Bar Examiners and may utilize such grading or scoring system as the Committee deems appropriate in its discretion."

would do little to advance the true concerns of the anti-trust laws, but would make administrative error and bias antitrust violations. *See id.*, at 454-455. Short of trial, it would effectively abolish the state action exemption; bias and abuse of discretion are easily alleged.

Having federal courts and juries reexamine a myriad of state agency decisions for bias and abuse of discretion would impose a heavy burden of litigation on the federal system and seriously interfere with state government. There is no need for such a massive shift in responsibilities from the states to the federal government. The states already provide ample remedies to correct their administrative agencies' errors.

When a subordinate state agency has acted to implement a clearly expressed state policy, the *Parker* exemption should apply whatever the agency's bias, interest, motive or error of law or fact. The exemption should be unavailable only when the agency's acts are "essentially private" in the sense that the state has not taken a position on the end to be accomplished by the agency's action *if properly carried out*.

Wise and efficient federalism argues against review by antitrust courts of ordinary state agency errors. The *Lafayette* authorization requirement should not be manipulated to thwart the fundamental *Parker* policy against antitrust scrutiny of state action. The antitrust court should require only that the result of the agency's act or decision be of the sort contemplated by state anticompetitive policy. "Ordinary" errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control.

Fn. omitted; Areeda, *supra*, 95 Harv.L.Rev. at 453; *accord: Llewellyn v. Crothers*, F.Supp., 1983-1 Trade Cas. (CCH) ¶ 65,358, pp. 70,137-70,138 (D.Ore. 1983).

Antitrust review of a claimed abuse of discretion is particularly inappropriate in this case. Surely, the Arizona

Supreme Court knows best whether its Committee on Examinations and Admissions went beyond the guidelines the court had set in its own rules. Under those rules, Ronwin had the right to review of his failing grade by the Arizona Supreme Court. Ariz.Sup.Ct.R. 28(c)(XII)(C). He exercised that right, subsequently petitioning this Court for certiorari to review the Arizona Supreme Court's adverse decision. *Ronwin v. Committee on Examinations and Admissions*, 419 U.S. 967 (1974). It would certainly be anomalous for a federal district judge or jury now to decide that the Arizona Supreme Court misinterpreted its own rules. See *Gambrel v. Kentucky Bd. of Dentistry*, *supra*, 689 F.2d at 619.

In short, to the extent the committee's state action exemption depends upon the committee's having acted pursuant to a clearly articulated and affirmatively expressed state policy, that requirement was met by the Arizona Supreme Court's rules which delegate to the committee the tasks of preparing, administering and grading the bar examination and which therefore contemplate the kind of action complained of here; namely, the choice of a particular method for grading the test.

(2) Though State Agencies Need Not be "Actively Supervised," Petitioners Were

In its second aspect, the *Midcal* test requires that private parties' acts be " 'actively supervised' by the State itself" in order to acquire state action immunity. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, *supra*, 445 U.S. at 105.

This Court has not yet determined whether state or municipal entities must meet this second prong of the *Midcal* test. See *Community Communications Co. v. City of Boulder*, *supra*, 102 S.Ct. at 841 n. 14. Three members of this Court, *id.*, at 851 n. 6 (Rehnquist, J., dissenting), and most lower courts have decided that active state supervision of public entities is not required. *Gold Cross Ambulance v.*

City of Kansas City, *supra*, 705 F.2d at 1014-1015; *Town of Hallie v. City of Eau Claire*, *supra*, 700 F.2d at 383-385; *Llewellyn v. Crothers*, *supra*, 1983-1 Trade Cas. (CCH) at p. 70,136; *Hybud Equip. Corp. v. City of Akron*, F.Supp., 1983-1 Trade Cas. (CCH) ¶65,356, pp. 70,123-70,124 (N.D. Ohio, 1983). As one lower court has pointed out, to ask whether "the state" actively supervises its own agencies is to ask a meaningless, tautological question. *Deak-Perera Hawaii, Inc. v. Department of Transportation*, 553 F.Supp. 976, 988-989 (D.Hawaii 1983); compare with *Euster v. Eagle Downs Racing Ass'n.*, *supra*, 677 F.2d at 995-996; *Benson v. Arizona State Bd. of Dental Examiners*, *supra*, 673 F.2d at 275. This Court should now hold that public entities need not show that they are actively supervised by the state in order to claim state action immunity.

If applicable, the active state supervision requirement is met in this case. Like the state bar in *Bates v. State Bar of Arizona*, *supra*, the Committee on Examinations and Admissions' "role is completely defined by the [Arizona Supreme C]ourt; the [committee] acts as the agent of the court under its continuous supervision." *Id.*, 433 U.S. at 361; Ariz.Sup.Ct.R. 28(a), (c)(V)-(IX). The committee's recommendations regarding the qualifications of applicants for admission to practice "are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in . . . proceedings" to review an applicant's failure to receive a satisfactory grade. *Id.*, at 362; Ariz.Sup.Ct.R. 28(c)(XII) (C); see, e.g., *Application of Klahr*, 102 Ariz. 529, 433 P.2d 977 (1967).

The actions of the Committee on Examinations and Admissions meet the requirements of the *Midcal* test. The restraint challenged here is not a private practice masquerading under "a gauzy cloak of state involvement." Rather, it is a restraint imposed to implement the clearly articulated state policy of assuring lawyer competence; a restraint imposed by the committee, an official state agency, under authority granted by and under the supervision of the Arizona Supreme Court. It is state action.

3. The Noerr-Pennington Doctrine Shields Petitioners' Acts

"Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); accord: *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Last term, this Court reaffirmed that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, U.S., 103 S.Ct. 2161, 2169 (1983). Unless engaged in as a "mere sham" for harassment purposes, acts initiating judicial proceedings are not prohibited by the antitrust laws. *Ibid.*; *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-511 (1972).

Like numerous other advisory boards,¹⁰ the sole function of the Arizona Committee on Examinations and Admissions is to recommend to a state governmental entity—in this case, the Arizona Supreme Court—the action it should take. Arizona Supreme Court Rule 28(a) provides that the committee shall examine applicants and recommend those it

¹⁰If this Court concludes that Ronwin's action is barred because it seeks collateral review of final judicial action by the Arizona Supreme Court, see pp. 12-14, *supra*, or because the state action exemption applies, see pp. 14-27, *supra*, it will be unnecessary to reach the issue of the *Noerr-Pennington* doctrine's application to the committee's recommendations. Nevertheless, the issue is one of broad application and general importance. Like the federal government, see H.R. Rep. No. 1017, 94th Cong., 2d Sess. (1972), reprinted in the 1972 U.S. Code, Cong. & Ad. News 3491, state governments rely on a wide array of advisory boards, committees and commissions, often composed of members of an affected industry, to provide information, recommendations and advice. Subjecting the recommendations of such advisory groups to antitrust scrutiny would gravely impair this necessary channel of information to state government.

finds qualified to the supreme court for admission to practice. "The [Arizona Supreme C]ourt will then consider the recommendations and either grant or deny admission." Ariz.Sup.Ct.R. 28(a).

The supreme court considers the committee's recommendations *de novo*, recognizing that "the admission to the practice of law is a judicial function [citation] [and] this court may, in the exercise of its inherent powers, admit to the practice of law with or without favorable action by the Committee. [Citations.]." *Application of Courtney*, 83 Ariz. 231, 319 P.2d 991, 993 (1957); accord: *Application of Klahr*, *supra*, 433 P.2d at 979.

On its own, the committee could not and did not prevent Ronwin from practicing law in Arizona. At worst, the result of its allegedly improper grading method was simply an incorrect recommendation, a recommendation that the supreme court deny Ronwin admission to practice. Whether or not motivated by anticompetitive purposes, that recommendation is just the sort of effort to influence official action which the *Noerr-Pennington* doctrine immunizes. See *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, *supra*, 439 U.S. at 110.

CONCLUSION

Insofar as it reinstated the complaint against petitioners, the judgment of the court of appeals should be reversed.

Dated: August 15, 1983.

Respectfully submitted,

KURT W. MELCHIOR
One Embarcadero Center,
25th Floor
San Francisco, CA 94111
(415) 398-3344

*Attorney for Amicus Curiae
National Conference of
Bar Examiners*

Of Counsel:

ALLAN ASHMAN
333 North Michigan Avenue,
Suite 1025
Chicago, IL 60601

JOHN E. HOLT-HARRIS, JR.
DEGRAFF, FOY, CONWAY,
HOLT-HARRIS & MEALEY
90 State Street
Albany, NY 12207

JAN T. CHILTON
SEVERSON, WERSON, BERKE
& MELCHIOR
A Professional Corporation
One Embarcadero Center
25th Floor
San Francisco, CA 94111

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AUG 24 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-1474

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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ON WRIT OF CERTIORARI TO THE
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FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION
TO THE MOTIONS FOR LEAVE TO FILE
AMICUS BRIEFS OF THE NATIONAL
CONFERENCE OF BAR EXAMINERS AND
OF THE STATE BAR OF CALIFORNIA

EDWARD RONWIN
P.O. Box 3585
Urbandale, Iowa 50322
(515) 223-8819
Respondent pro se

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ARGUMENT

The State Bar of California ("SBC") reports that "...Respondent has refused..." consent to its filing as amicus, SBC motion, p. 1, whereas, The National Confer-

ence of Bar Examiners ("NCBE") recites that "...respondent Ronwin has withdrawn his consent previously given...", NCBE motion, p.i. Although NCBE's version is more correct, its insinuation that Ronwin's word is unreliable is totally false.

About ten weeks ago, Kurt W. Melchior ("Melchior") called Ronwin to ask for Ronwin's consent to the filing of amicus briefs by his client, NCBE, and by SBC. Ronwin declined to declare his position, but informed Melchior that an agency in each of two States was planning to become amicus in favor of Ronwin's side. Melchior asked for the identity of the two agencies, but Ronwin refused disclosure; however, on Melchior's persistence, Ronwin revealed the identities upon the solemn promise by Melchior that nobody from NCBE, SBC or from Petitioner Hoover's group would cause the Bars of the respective States to attempt to dissuade either agency from seeking

amicus status and, as at the time of that telephone conversation Ronwin was not versed with the terms of Rule 36.4, Ronwin and Melchior agreed that Ronwin and Hoover's side would consent to amicus standing for all who sought that status. The respective agencies who intended to support Ronwin were the New Jersey Public Advocates Office, Trenton, New Jersey, and the Attorney General's Office of Maryland, Baltimore, Maryland.

Soon after the talk with Melchior, the New Jersey agency began to distance itself and within a month informed Ronwin that it would not become amicus.

On August 1, 1983, Ronwin received a letter from Melchior asserting that "...you were kind enough to agree that our client [NCBE], might file an amicus brief on the merits in this matter.." and asking Ronwin to pay "prompt attention" to the letter's request that Ronwin "send [Melchior] a

letter consenting to [NCBE's] brief.."

Subsequent thereto: (1) Ronwin learned that the Board of Law Examiners of Maryland contacted the Attorney General's Office of Maryland with respect to this case and that NCBE caused that contact to be made within a day or two after Melchior had gotten the identity of said State agencies from Ronwin; (2) Melchior admitted that he had discussed the identities with Henry C. Thumann, counsel for SBC, with Allan Ashman of NCBE (of counsel herein), and with Donn G. Kessler, of Hoover's firm and of counsel herein; (3) Ronwin informed Melchior and Thumann in separate calls each initiated to Ronwin that: (i) Ronwin was not further bound to consent to amicus status and (ii) that Melchior had broken his promise, whether directly or indirectly; (4) In subsequent conversation, Melchior claimed that neither his firm, nor NCBE, SBC or Hoover's group was responsible for the Maryland Bar

contact, but that is absolutely false.

The Maryland Attorney General's Office indicates that it continues to plan to enter herein as amicus in Ronwin's favor as to the aspects of the case in which it has interest.

Nevertheless, Melchior's actions are disgraceful and unethical. Moreover, it is submitted that such actions are a flagrant interference with this Court's amicus scheme which Ronwin takes to imply that no one would bring, or attempt to bring, raw political pressure to deter a prospective amicus' interest to aid this Court. Ronwin suggests that Melchior's conduct is a contempt of this Court's process. Further, Melchior's attempt to interfere contrary to his solemn promise was most likely communicated to Thumann (SBC), Ashman (NCBE) and Hoover's group, since, as above, Melchior admitted discussing the State agencies with those parties.

NCBE has submitted an affidavit to this Court averring that three copies of its motion (and brief) were sent to Ronwin on August 15, 1983 at an address which was the correct town, but wrong Post Office Box number. Although the postal authorities have been alerted and have checked thoroughly to date, those copies have not reached Ronwin. This Court's Rule 28 requires service in mandatory terms. Although Ronwin has now received three other copies from Melchior sent on August 18, 1983 by Express Mail and a separate copy from this Court's Clerk's office, no service "at or before the time of filing," per Rule 28.3 was had herein of NCBE's motion and brief. There is no end to the games Melchior and NCBE are willing to play. Ought there not be sanctions against them?

Both NCBE and SBC were amicus in the 9th Circuit phase. Both amicus briefs ran in similar vein: if Ronwin prevails, the sky will fall, see NCBE's first amicus brief

in the 9th Circuit, p. 14, line 21 to p. 15, line 1. Whether or not Ronwin prevails, Bar examinations will not cease; the sky will not fall and to roughly paraphrase My Fair Lady, "America will still be here without NCBE." SBC's brief in the 9th Circuit mimicked NCBE's two briefs. So impressed was the 9th Circuit with the amicus briefs of NCBE and that of SBC, that neither the majority nor the minority took note of them in the initial or in the final decision of the 9th Circuit; initial decision published at 1981-2 Trade Cas. (CCH) ¶64,414, and the amended final decision is at 686 F.2d 692 (9 Cir. 1982).

In the 9th Circuit the amicus briefs of NCBE and SBC merely filled the record with paper and the record already has more than enough of that. Worse, said brief's paper added nothing of guidance value to the 9th Circuit and one can expect nothing more if said entities are given amicus status

here.

WHEREFORE, Ronwin urges this Court to deny said motions for amicus standing and to hold Mr. Kurt W. Melchior in contempt of this Court.

Respectfully submitted

A handwritten signature in cursive script, appearing to read "Edward Ronwin", written over a horizontal line.

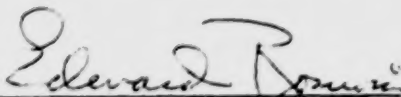
Edward Ronwin
P.O. Box 3585
Urbandale, Iowa 50322
(515) 223-8819
Respondent pro se

AFFIDAVIT

STATE OF IOWA)
) ss.
POLK COUNTY)

I, EDWARD RONWIN, being first duly sworn upon oath, depose and say:

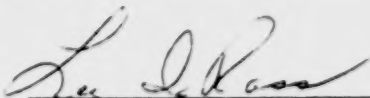
That I am the Respondent pro se in the above-entitled action and that the facts that I recite in the foregoing Brief in Opposition are true of my own personal knowledge.



Edward Ronwin

SWORN AND SUBSCRIBED to before me this

23rd day of August, 1983.



Notary Public in and for
the State of Iowa

My commission expires: 8-26-85

No. 82-1474

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6 1983

ALEXANDER L. STEVAS
CLERK

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CALIFORNIA"**

Of Counsel:

ALLAN ASHMAN
333 North Michigan Ave.,
Suite 1025
Chicago, Illinois 60601

JOHN E. HOLT-HARRIS, JR.
DEGRAFF, FOY, CONWAY,
HOLT-HARRIS & MEALEY
90 State Street
Albany, New York 12207

JAN T. CHILTON

SEVERSON, WERSON, BETKE & MELCHIOR
A Professional Corporation
One Embarcadero Center, 25th Floor
San Francisco, California 94111

KURT W. MELCHIOR

One Embarcadero Center,
25th Floor
San Francisco, California 94111
(415) 398-3344

*Attorney for Amicus Curiae
National Conference of
Bar Examiners*

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It is distressing that this high Court is burdened with a quarrel between counsel about conversations within the normal range of professional communications; and for this we apologize. However, a reply must be made to Mr. Ronwin's charges that the undersigned counsel for the National Conference of Bar Examiners engaged in "disgraceful and unethical . . . actions [in] a flagrant interference" with this Court's business. Respondent's Brief, 5.

We had thought not to dignify Mr. Ronwin's charges with a response and not to burden the Court with a matter such as this, but concluded that his factual claims required a brief response.

The facts about the conduct of the National Conference of Bar Examiners ("NCBE") and its attorney, Kurt W. Melchior ("Melchior") are these:

1. In his original conversation with Mr. Ronwin, Melchior stated that neither he nor NCBE would cause any interference with the decision-making of any potential amici curiae, although it would be useful to identify the interested parties.

2. Neither NCBE nor Melchior have attempted directly or indirectly in any manner to interfere with anyone, or to "pressure" them against submitting a brief in support of Mr. Ronwin's position.

3. Recently, Linda Jones, an Assistant Attorney General of Maryland, called Melchior to ask for a copy of the NCBE brief. In this conversation, Ms. Jones stated that she was the attorney who would write any brief Maryland might file in this action, and that she was aware of no contacts with her office by NCBE or the Maryland Bar on the matter, other than an inquiry by the Maryland Board of Law Examiners as to what the case was about.

Surely the Attorney General of Maryland and the Public Advocate of New Jersey are competent to make their own decisions about submitting briefs and hardy enough to decide such things on their merits.

The true point about the acceptance of amicus curiae briefs is surely whether the briefs are filed according to

the Rules of this Court and address issues before the Court in a helpful manner; and we respectfully request that NCBE's application for leave to file its brief be judged on that basis.

We are embarrassed that a matter of this nature has been presented to this Court at all; but Mr. Ronwin's objections are not well taken and should be rejected.

Dated: August 31, 1983.

Respectfully submitted,

Of Counsel:

ALLAN ASHMAN
333 North Michigan Ave.,
Suite 1025
Chicago, Illinois 60601

JOHN E. HOLT-HARRIS, JR.
DEGRAFF, FOY, CONWAY,
HOLT-HARRIS & MEALEY
90 State Street
Albany, New York 12207

JAN T. CHILTON

SEVERSON, WERSON, BERKE & MELCHIOR
A Professional Corporation
One Embarcadero Center, 25th Floor
San Francisco, California 94111

KURT W. MELCHIOR
One Embarcadero Center,
25th Floor
San Francisco, California 94111
(415) 398-3344

*Attorney for Amicus Curiae
National Conference of
Bar Examiners*

VERIFICATION

(28 U.S.C. § 1746)

I declare under penalty of perjury that I am a member of the Bar of the Supreme Court of the United States and that all statements of fact in the foregoing Reply are true and correct.

Executed on August 31, 1983.

Kurt W. Melchior

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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

LAWRENCE G. WALLACE
Acting Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

JOHN H. GARVEY
Assistant to the Solicitor General

BARRY GROSSMAN
NANCY C. GARRISON
WILLIAM J. ROBERTS
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

QUESTIONS PRESENTED

1. Whether a complaint alleging that Arizona's bar examiners violated Section 1 of the Sherman Act by limiting bar admissions for reasons unrelated to the applicants' legal competence may be dismissed on the ground that such concededly unauthorized conduct is immune from the Sherman Act as state action.

2. Whether the bar examiners' alleged conduct is immune from the Sherman Act under the *Noerr-Pennington* doctrine.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1474

CHARLES R. HOOVER, ET AL., PETITIONERS

v.

EDWARD RONWIN

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT**

INTEREST OF THE UNITED STATES

This case concerns the scope of the "state action" exemption from the federal antitrust laws, developed by this Court in *Parker v. Brown*, 317 U.S. 341 (1943), and subsequent cases. The United States has primary responsibility for enforcement of the antitrust laws. For that reason it has an interest in assuring that the state action doctrine is applied with regard for the principles of federalism on which it is based, and that only conduct properly characterized as action of the state as sovereign is excluded from the coverage of the Sherman Act. The United States has, accordingly, participated in most of the cases in which this Court has articulated the anti-trust state action doctrine.

STATEMENT

1. Petitioners are members of the Arizona Supreme Court's Committee on Examinations and Admissions

("Committee"), which was established by the Arizona Supreme Court to examine and recommend applicants for admission to the Arizona bar. Ariz. Sup. Ct. R. 28(c). Respondent took and failed the Arizona bar examination in 1974. The Committee recommended that the Arizona Supreme Court deny him admission to the bar. (Pet. App. A2.)

The Rules of the Supreme Court of Arizona provide procedures by which an applicant aggrieved by the Committee's action may seek review. Invoking these procedures, respondent petitioned the state Supreme Court under Ariz. Sup. Ct. R. 28(c)(XII)(F)(1)(C) for review of the Committee's action.¹ He contended that it had "conducted the EXAM in an unlawful manner" in that it (i) failed to use a uniform standard in grading the essay portion, (ii) failed to file its proposed grading formula with the court within the time required by Rule 28(c)(VII)(B), (iii) set the passing score too high, and (iv) used a statistical grading approach that did "not measure individual performance, *per se* [and] detrimentally distorted RONWIN's overall grade * * *." Petition For Review By The [Arizona] Supreme Court at 2 (No. SB-52) (filed May 1, 1974) (lodged with the Clerk of this Court). Respondent argued to the Arizona

¹ Respondent also appears to have sought review by the Committee under Rule 28(c)(XII)(G) (see *Ronwin v. Committee on Examinations and Admissions*, No. 74-140, Br. in Opp. at 5 (1974 Term)). Under that rule "[a]n applicant aggrieved by the failure of the Committee to award said applicant a satisfactory grade upon an examination" may obtain review by the Committee of the grading of his examination. If the Committee rules against the applicant, however, he cannot obtain review by the state Supreme Court unless at least three members of the Committee dissent. Rule 28(c)(XII)(G)(5). Review by the state Supreme Court is available under Rule 28(c)(XII)(F)(1) to "[a]n applicant aggrieved by any decision of the Committee * * * (C) [f]or any substantial cause other than with respect to a claimed failure to award a satisfactory grade upon an examination * * *."

We will refer throughout to the Rules in effect in 1974, which in relevant part may be found at 110 Ariz. XXVII.

Supreme Court that the methods used by the Committee in grading the exam "constitute[d] a method designed less to examine applicants in a relevant manner and more to control the numbers of applicants permitted to engage in the practice of law, regardless of their actual legal abilities" (*id.* at 3). Accordingly, he alleged, the Committee's actions violated his constitutional rights to due process and equal protection and his right to practice law, and constituted "a conspiracy in the restraint of trade or commerce in contravention of the Sherman Anti-Trust Act" (*id.* at 3-4). Finally, respondent contended that his experience and education qualified him for the bar regardless of the examination results (*id.* at 5). He therefore asked the court to exercise its discretionary power and admit him to the bar.

The Arizona Supreme Court denied respondent's petition. See *Ronwin v. Committee on Examinations and Admissions*, No. 74-140, Pet. App. A1 (1974 Term). He twice sought and was denied rehearing in that court (*id.* at A3-A4). Respondent then petitioned this Court for a writ of certiorari to review the state decision which, he asserted, deprived him of due process and equal protection. This Court denied his petition. 419 U.S. 967 (1974).²

2. In March 1978, respondent filed this action in the United States District Court in Arizona. He alleged that members of the Committee had conspired to restrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. 1) by "artificially reducing the numbers of competing attorneys in the State of Arizona" (J.A. 10-11). To effectuate the conspiracy, he claimed, the Committee

² Respondent applied to retake the bar examination in July 1974, but was denied permission to do so because the Committee declined to certify that he was "mentally and physically able to engage in active and continuous practice of law" (Ariz. Sup. Ct. R. 28(c) (IV) (4)). After a formal hearing, a special committee also found him unfit. This finding was affirmed by the Arizona Supreme Court. *In re Ronwin*, 113 Ariz. 357, 555 P.2d 315 (1976), cert. denied, 430 U.S. 907 (1977).

assigned a "raw score" to each examination and then, after reviewing the raw scores, "picked a particular raw score value as equal to the passing grade of [s]eventy." By using this procedure rather than basing admission on "achievement by each Bar applicant of a pre-set standard" (J.A. 10), he charged, the Committee had imposed limitations on entry that were unrelated to the state policy of insuring competence.

The members of the Committee moved to dismiss the complaint for failure to state a claim (Fed. R. Civ. P. 12(b)(6)) and for lack of subject-matter jurisdiction. They argued that the conduct alleged was exempt from the antitrust laws under the state action doctrine of *Parker v. Brown*; that respondent was not injured by the conduct complained of;³ and that the conduct complained of did not sufficiently affect interstate commerce to come within the Sherman Act jurisdiction of the federal courts. The district court granted the motion to dismiss. It held that the complaint failed to state a claim upon which relief could be granted; that the court lacked subject-matter jurisdiction; and that respondent lacked standing (Pet. App. A36).

3. The Ninth Circuit reversed the dismissal of the complaint⁴ and remanded the case to the district court. Applying the test articulated by this Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), the court concluded, on the issue of state action immunity, that the complaint should not have been dismissed because "at this stage of the proceedings . . . [i]t has not been established that the alleged restraint was 'clearly articulated and affirmatively expressed as state policy'" (Pet. App. A6). No

³ Petitioners argued that even if respondent had passed the examination he would have been refused admission on other grounds. See note 2, *supra*.

⁴ The court of appeals affirmed the district court's denial of respondent's motion for recusal of the district judge (Pet. App. A16-A18).

statute or state Supreme Court rule required the challenged grading procedure. And "[t]he fact that the Arizona Supreme Court has delegated to the Committee the general authority to examine applicants to determine if they are qualified to practice law and reviews the Committee's recommendations regarding admission does not alone clothe the Committee's unilateral grading policies with blanket immunity from the antitrust laws" (Pet. App. A7). The court declined to consider whether the grading formula had been reviewed and approved by the Arizona Supreme Court, since the relevant facts had not yet been presented to the district court (*id.* at A9).

Relying on this Court's decisions in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1978), and *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 48-52 (1982), the court also rejected the Committee's argument that its status as a public body was itself dispositive of the state action issue (Pet. App. A8). The court remanded the case for a determination of the truthfulness of petitioner's allegations, and a decision whether the Arizona Supreme Court had in fact authorized the challenged grading policy.⁵ It indicated that summary judgment might be available to resolve many of the issues on remand (Pet. App. A18 n.12).⁶

⁵ The court also held that respondent should be given an opportunity to prove that the Committee's actions either were "in commerce" or had an "effect on commerce," and so were within the jurisdiction of the Sherman Act (Pet. App. A11-A14). In addition, it concluded that respondent's allegation of injury was sufficient, because he "was not found mentally unfit to practice law by the Arizona Supreme Court until * * * twenty-seven months after [the] exam results [complained of] were released. If Ronwin had passed the exam, he arguably would have been able to practice law until he was found, by final decision, to be mentally unfit" (Pet. App. A14-A15; footnote omitted). Petitioners do not challenge either of these holdings.

⁶ Judge Ferguson dissented. He would have held that the Arizona Supreme Court—not the Committee—was the proper defendant,

SUMMARY OF ARGUMENT

I. The district court dismissed this action on the basis of the pleadings. Fed. R. Civ. P. 12(b)(6). Whether petitioners are entitled to state action immunity as a matter of law must therefore be determined by accepting the allegations of the complaint as true. The complaint charges that petitioners have limited bar admissions in a way that is entirely unrelated to the articulated state policy of insuring competence. For that reason the court of appeals properly concluded that the complaint was improperly dismissed.

A. The state action doctrine rests on complementary principles of federalism: Congress did not intend to prohibit "state action or official action directed by a state." *Parker v. Brown*, 317 U.S. 341, 351 (1943). On the other hand, states may not simply authorize private conduct in restraint of trade. In applying these principles, this Court has distinguished among three types of cases. First, it has made clear that the Sherman Act does not apply at all to action by a state legislature or supreme

since the Court had reserved to itself the power of final decision on admissions. And even if that were not so, he would not have required (as he believed the majority had) that the Committee's actions be compelled by the state. That requirement, he noted, was properly applicable only to private conduct (Pet. App. A27). Since the Committee was a state agency the proper question, under this Court's decisions in *City of Lafayette* and *City of Boulder*, was whether it had "acted 'pursuant to state policy to displace competition with regulation,' * * * and whether that policy was 'clearly articulated and affirmatively expressed' " (*id.* at A29). Under that test, Judge Ferguson concluded, the state Supreme Court's rule directing the Committee to "examine applicants and recommend * * * for admission to practice applicants who are found by the committee to have the necessary qualifications" was sufficient authorization for any bar admission standards and grading procedures adopted by the Committee (Pet. App. A31, A33). Judge Ferguson also stated that there was no basis for antitrust jurisdiction, since "on the facts of this case, plaintiff could not demonstrate more than the trivial impact of a curved grading system" on interstate commerce (Pet. App. A34).

court, since they hold the ultimate authority for making state policy. Second, subordinate state instrumentalities share in that immunity only when acting pursuant to a clearly articulated state policy to displace competition with state control. This rule is flexible enough to allow the delegation of discretion to state agencies; but an agency's mandate must at least authorize the kind of restraint imposed. Third, privately imposed restraints will be tolerated only if they have been compelled by the direction of the state and are "'actively supervised'" by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

B. Arizona's Committee on Examinations and Admissions is a state agency under the control of the Arizona Supreme Court. That court has clearly articulated a policy of examining the competence of applicants for admission to the state bar. On the other hand, the court has made clear that admission is *not* to be limited for other reasons—*e.g.*, in order to restrict competition in favor of incumbent members of the bar. Respondent's complaint alleged that petitioners have "artificially reduc[ed] the numbers of competing attorneys in the State of Arizona" (J.S. 11) in a way that does not further the court's policy of assuring competence. If that is so—a conclusion assumed for purposes of the motion to dismiss—then petitioners have not acted in furtherance of a clearly articulated state policy, and so would not be entitled to state action immunity.

It is true that the state Supreme Court has given the Committee discretion in the grading of bar examinations. But the restraint alleged here does not concern Committee decisions about what exam answers are right or wrong, or how many correct answers are a sufficient indication of competence. The fact that the court has given the Committee discretion to act in those areas does not mean that the Committee also has discretion to impose restraints on competition that are unrelated to competence.

II. Although the complaint here was improperly dismissed, the ordinary rules of civil procedure afford ample

protection to the states' interest in conferring discretion on their bar admissions committees. Summary judgment would be appropriate if the Committee here shows, for example, that its choice of a passing raw score was simply a method of accounting for differences in the difficulty of examinations from year to year. In deciding the factual question whether the Committee's grading system furthers state policy, the district court should also take account of any evidence that the state Supreme Court has reviewed the Committee's actions.

The district court should also consider whether the rules of issue preclusion prevent relitigation of the question whether the Committee's grading system furthers state policy, since the Arizona Supreme Court has already dismissed a petition by respondent challenging the grading system.

ARGUMENT

I. THE PLEADINGS IN THIS CASE, TAKEN ALONE, DO NOT SHOW THAT PETITIONERS ARE IMMUNE FROM SHERMAN ACT LIABILITY ON STATE ACTION GROUNDS

A. State Agencies Are Entitled To Immunity Only For Actions In Furtherance Of A Clearly Articulated State Policy To Displace Competition With State Control

1. The state action doctrine rests on principles of federalism first articulated in *Parker v. Brown*, 317 U.S. 341 (1943). There the Court noted that the Sherman Act was intended as a broad prohibition against restraints imposed on competition by private conduct. Because Congress had not addressed state-imposed restraints in either the Act or its history, however, the Court declined to impute to Congress an intent to prohibit "state action or official action directed by a state." 317 U.S. at 351. At the same time, the Court emphasized that the states cannot immunize private restraints of trade: "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by de-

claring that their action is lawful" (*ibid.*). These complementary concepts of federalism underlying *Parker* focus judicial scrutiny on the question whether the challenged restraint on competition is properly attributable to the decision of the state as sovereign to displace competition with state control of the conduct at issue.

But the lines between "state action," "official action directed by a state," and state-authorized private restraints (*Parker*, 317 U.S. at 351) are not always bright. Many cases will involve a mixture of statutory commands, delegated authority to subordinate governmental units, and private participation.⁷ The permissibility of any given restraint will ultimately depend on the extent to which it is dictated and controlled by the state in its sovereign capacity. We turn now to an analysis of competitive restraints imposed in varying circumstances (i) by the state as sovereign, (ii) by subordinate units of state government, and (iii) by private parties.

a. *Action by the state itself.* For purposes of the state action doctrine, this Court has held that the Sherman Act does not apply to actions by the state legislature⁸ (and in matters concerning regulation of the bar, the state supreme court), since they hold the ultimate authority for making state policy. Thus in *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-360 (1977), the Court found that "the challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules 27(a) and 29(a) and its Disciplinary Rule 2-101(B). That court

⁷ In *Parker*, for example, the decisive factor was that the state legislature had articulated a clear intent "to restrict competition among * * * growers and maintain prices" when it passed the Agricultural Prorate Act, and had required adherence to any marketing plan that was adopted. 317 U.S. at 346, 347. But the request for a plan had to be initiated by producers, and the plan was drafted by producers and packers serving on the program committee (*id.* at 346-347). Finally, the Commission, a state agency, was required to approve any plan (*id.* at 347).

⁸ See, e.g., *Parker v. Brown*, 317 U.S. at 350 ("the legislative command of the state").

is the ultimate body wielding the State's power over the practice of law, * * * and, thus, the restraint is 'compelled by direction of the State acting as a sovereign.' " See also *Olsen v. Smith*, 195 U.S. 332, 344-345 (1904).⁹ This Court will not explore the motives behind, or the importance of, such an assertion of sovereign authority—much as it will not question a clear statement by Congress that it has chosen to supplant the antitrust laws. But the very fact that the state's legislature (or supreme court) has made the decision itself, rather than by delegating the matter to a lower level of government, provides assurance "that federal policy is [not] being unnecessarily and inappropriately subordinated to state policy * * *." *Bates*, 433 U.S. at 362.

b. *Action by state agencies.* "[F]or purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign." *City of Lafayette*, 435 U.S. at 410 (opinion of Brennan, J.); *City of Boulder*, 455 U.S. at 53-54.¹⁰ When the restraint at issue is imposed

⁹ It has been suggested that even actions attributable to the state as sovereign should be preempted by the Sherman Act if they displace competition in a way that has adverse effects on nonresidents. See Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. Law & Econ. 23, 38-39 (1983). The rationale for such a limitation is that the electoral process constrains the state legislature to protect the interests of its citizens, but citizens of other states have no power to vote against the legislators who impose restraints with extraterritorial effects (*ibid.*). Territorial limitations on state action immunity are not an issue here, however, since the challenged restraint is alleged to affect only "the numbers of competing attorneys in the State of Arizona" (J.A. 11).

Parker v. Brown also left open the possibility that immunity would be denied if "the state or its municipality [became] a participant in a private agreement or combination by others for restraint of trade" (317 U.S. at 351-352).

¹⁰ Although both *City of Lafayette* and *City of Boulder* involved municipalities, it is clear that the rule they applied is not so limited. Though the county bar association in *Goldfarb* was a voluntary association, the State Bar was "'an administrative agency of the [Virginia Supreme] Court.'" *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 776 n.2, 790 (1975) (quoting Va. Code Ann. § 54-49

by a subordinate state agency, this Court has held that it is to be attributed to the state only if the legislature or supreme court has clearly articulated a policy to displace a particular aspect of competition with state control, and the agency has acted in furtherance of that mandate. *City of Lafayette*, 435 U.S. at 410, 413, 415 (opinion of Brennan, J.); *City of Boulder*, 455 U.S. at 54-55. It is not enough that the state has given the agency a general regulatory authority to implement a broad public interest standard (*ibid.*), or articulated a policy to displace competition in some other area of an industry's activities. Cf. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). Such a mandate may indicate nothing more than sovereign neutrality concerning the challenged restraint—an assertion of authority too ambiguous to confer state action immunity. *City of Boulder*, 455 U.S. at 55.¹¹

(1972)). See also *City of Lafayette*, 435 U.S. at 408 (opinion of Brennan, J.) ("state agencies or subdivisions of a State"). The lower courts have treated municipalities and subordinate state agencies alike. See, e.g., *Caribe Trailer Systems v. Puerto Rico Maritime Shipping Auth.*, 475 F. Supp. 711, 720-723 (D.D.C. 1979), *aff'd*, No. 79-1658 (D.C. Cir. July 3, 1980), *cert. denied*, 450 U.S. 914 (1981); *Jordan v. Mills*, 473 F. Supp. 13, 15 (E.D. Mich. 1979); *United States v. Texas State Bd. of Public Accountancy*, 464 F. Supp. 400, 404 (W.D. Tex. 1978), *aff'd as modified*, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925 (1979); *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Auth.*, 451 F. Supp. 157, 166-168 (S.D.N.Y. 1978). Petitioners do not contend that the two categories should be treated differently.

¹¹ Neutrality on the part of the state could indicate that the ultimate policymaking body delegated to a subordinate agency the authority to regulate some aspects of an industry, without considering the possibility that the agency would impose a restraint of the type at issue. Alternatively, it could indicate that the legislature considered the restraint and was unwilling to impose it as state policy, but chose to take a neutral stance rather than specifically prohibit it. In neither case would a subordinate agency that imposes such a restraint be furthering the policy of the ultimate sovereign authority.

On the other hand, we believe that the court of appeals erred if it meant to suggest that a state agency must show that its par-

This rule recognizes the need for states to delegate to subordinate levels of government the discretion to implement state policies. For example, the Court has left open

ticular conduct is *compelled* by the state legislative or supreme court in order to obtain state action immunity. See *Pet. App. A27*. That requirement, while appropriate in the case of private parties (see pages 14-16, *infra*), would confine too closely the discretion of state agencies. Compare *Parker v. Brown*, 317 U.S. at 351, and *Cantor*, 428 U.S. at 592-593 (state must command, not simply authorize, private action), with *City of Boulder*, 455 U.S. at 57 (city's action may be "directed or authorized"), and *City of Lafayette*, 435 U.S. at 414 (issue is whether the state "authorized or directed" municipal action). See also *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1011-1014 & n.11 (8th Cir. 1983); *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 381-382 (7th Cir. 1983), petition for cert. pending, No. 82-1832; *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), vacated and remanded, 455 U.S. 931 (1982), on remand, 1983-1 Trade Cas. (CCH) ¶ 65,356 (N.D. Ohio 1983); *Llewellyn v. Crothers*, 1983-1 Trade Cas. (CCH) ¶ 65,358 (D. Ore. 1983); *Stauffer v. Grand Lake*, 1981-1 Trade Cas. (CCH) ¶ 64,029, at 76,328-76,329 (D. Colo. 1980); *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Area Solid Waste Agency*, 557 F. Supp. 131, 135-136 (S.D. Iowa 1982). Cf. *Pueblo Aircraft Service, Inc. v. City of Pueblo*, 679 F.2d 805 (10th Cir. 1982), cert. denied, No. 82-352 (Jan. 10, 1983). But see *Mason City Center Assoc. v. City of Mason City*, 468 F. Supp. 737, 743 (N.D. Iowa 1979).

Adherence to a test of authorization (pursuant to an articulated policy determination to displace competition), rather than a test of compulsion, for acts of subordinate government agencies recognizes that the effective exercise of the states' sovereign powers in a complex modern society (i) requires the delegation of state governmental power to subordinate governmental bodies, and (ii) cannot practicably be limited to delegations by state legislatures of power to subordinate agencies solely in terms of express compulsion to perform specific tasks by precisely described means. On the other hand it also recognizes that, because subordinate governmental units are not the state itself and have no independent *Parker* immunity, the exemption applies only to agency actions that constitute the implementation of a state policy to displace competition with respect to the specific activity at issue. There is thus an obvious distinction between authorization to engage in "the kind of action complained of" (*City of Boulder*, 455 U.S. at 55) and a general grant of authority that does not mention (or, as in this case, rejects) the challenged restraint on competition.

the question whether the requirement of active state supervision announced in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), must be met by public defendants. *City of Boulder*, 455 U.S. at 52 n.14. In the case of private defendants, that requirement assures agency participation in the details of statutory implementation. But it may be doubted whether *Midcal* intended that each state agency should in turn have its own active supervision (apart from general legislative oversight and judicial review).¹²

Nor is it an affront to state sovereignty to insist that a policy to restrain competition be laid down by the legislature (or supreme court) rather than by an agency. After all

Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the anti-trust laws. . . .

[And in the latter context this] Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, "and even then only to the minimum extent necessary."

¹² The lower courts have generally declined to require active state supervision of the activities of municipalities and state agencies. See, e.g., *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d at 1014; *Town of Hallie v. City of Eau Claire*, 700 F.2d at 382-383; *Gambrel v. Kentucky Bd. of Dentistry*, 689 F.2d 612, 620 (6th Cir. 1982), cert. denied, No. 82-1067 (Feb. 22, 1983); *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 995-996 (3d Cir. 1982), cert. denied, No. 82-501 (Nov. 15, 1982); *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 275 (9th Cir. 1982); *Llewellyn v. Crothers*, *supra*; *Hybud Equipment Corp. v. City of Akron*, 1983-1 Trade Cas. (CCH) ¶ 65,356; but see *Corey v. Look*, 641 F.2d 32, 36-37 (1st Cir. 1981). There may be more justification for an "active supervision" requirement where the subordinate state instrumentality is itself a participant in the market, or where the agency involved is—as in this case—composed of members of the regulated business.

Cantor, 428 U.S. at 596-597 (footnotes omitted). In the case of federal agencies, this Court's skeptical approach is nothing more than a way of determining the intent of Congress, given the assumption that it would not displace the antitrust laws without saying so explicitly or by necessary implication (*id.* at 597-598 n.37). Little more is demanded of a state when agency action is required to rest on a "clear articulation and affirmative expression" by the legislature (or supreme court) of an intent to suppress competition with the state's own regulatory policy.

The key issues in this case are thus the adequacy of the delegation, and agency compliance with it. The latter is a mixed question of fact and state law. The former, although rooted in state law, presents a question of federal law under the Sherman Act. *City of Boulder*, 455 U.S. at 52 n.15.

c. *Action by private parties.* The third category of cases (a category not germane here) involves restraints on competition imposed by private parties with "state authorization, approval, encouragement, * * * participation" or direction. *Cantor*, 428 U.S. at 592-593 (footnotes omitted). In such cases this Court has consistently made clear that private action, in order to share in the state's immunity, "must be compelled by direction of the State acting as a sovereign," and it must be the subject of supervision. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) (emphasis added); *Midcal*, 445 U.S. at 104.¹³ The compulsion requirement is not satisfied simply because the private actor must abide by, for example,

¹³ See *United States v. Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983) (en banc), petition for cert. pending, No. 82-1922; *United States v. Title Insurance Rating Bureau, Inc.*, 700 F.2d 1247, 1253 (9th Cir. 1983), petition for cert. pending, No. 83-154; *Sound, Inc. v. AT&T Co.*, 1980-2 Trade Cas. (CCH) ¶ 63,514, at 76,739-76,740 (8th Cir. 1980); Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates*, 77 Colum. L. Rev. 898, 913-921 (1977).

a rate schedule whose terms he (rather than the state) sets. The private party must retain no significant "freedom of choice" in either "the initiation [or the] enforcement of the program under attack." *Cantor*, 428 U.S. at 593. In announcing its "two standards for antitrust immunity" (445 U.S. at 105), *Midcal* did not, as has been suggested,¹⁴ intend to supplant this compulsion requirement with a more lenient standard in the case of private parties. On the contrary, *Midcal* made clear that it was reiterating and reaffirming the standards adopted in prior cases. 445 U.S. at 105. With respect to private parties, those cases emphasize that *Midcal's* first "standard"—a "clearly articulated and affirmatively expressed" state policy—can be satisfied only by a *requirement* that competition be restrained. Mere "authorization, approval, encouragement, or participation" by the state will not suffice. *Cantor*, 428 U.S. at 592-593 (footnotes omitted); *Parker v. Brown*, 317 U.S. at 351. The significance of *Midcal's* "two standards" is that compulsion alone is *not enough* to immunize private action.¹⁵ Before the Sherman Act will be displaced, private action pursuant to state command must also be "'actively supervised' by the State itself" (445 U.S. at 105).

This stricter compulsion standard, imposed only on private restraints, also reflects the *Parker* federalism principles. Where a private restraint results only from state compulsion, it may fairly be viewed as mere com-

¹⁴ See Areeda, *Antitrust Immunity For "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 438 (1981).

¹⁵ The fact that compulsion was a necessary, but not always sufficient, ground for affording a state action defense to private restraints was first indicated in *Goldfarb*, 421 U.S. at 790 (emphasis added), where this Court stated that "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign."

Whether damages can be awarded against private defendants in a case involving state compulsion but lacking state supervision remains an open question.

pliance with the *state's* decision to displace competition with state regulation. By contrast, restraints resulting from private freedom of choice are entitled to no *Parker* immunity because unlike state instrumentalities, private parties (if given an option) are expected to act in pursuit of their private interests. And the state may not frustrate federal antitrust policy by "authorizing" private parties to compete or not as they wish. That is the very choice denied them by the Sherman Act.

B. State Action Immunity Protects Only Those Committee Actions Implementing The State's Policy Of Requiring That Bar Applicants Be Competent

1. Petitioners' primary argument is that the complaint was properly dismissed because they are state officials acting pursuant to a clearly articulated state policy to supplant competition with regulation (Pet. Br. 25-62). Petitioners are correct in claiming that, as a state agency,¹⁶ the Committee is entitled to immunity for

¹⁶ In their petition (Pet. 9-15), petitioners argued that their action was immune from Sherman Act review because it was "direct action by the state itself" (Pet. i, Question 1). They do not now appear to press this contention, which conflicts with this Court's holdings in *City of Lafayette*, 435 U.S. at 408 (opinion of Brennan, J.), and *City of Boulder*, 455 U.S. at 53, that subordinate state instrumentalities are not the state as sovereign, and are therefore not entitled to blanket state action immunity by virtue of their status alone. The state body empowered to set policies regulating the practice of law in Arizona is the Arizona Supreme Court. See *In re Bailey*, 30 Ariz. 407, 248 P. 29 (1926); *Bates v. State Bar of Arizona*, 433 U.S. at 360. Accordingly, only the state Supreme Court is the "state" for purposes of ascertaining whether *Parker* immunity applies to the restraint alleged here.

The court of appeals correctly concluded that the Committee is not the state itself, but a subordinate entity under the Supreme Court. (It did not view the Committee as a private entity, and respondent does not argue that it is.) The Committee consists of seven active members of the state bar, and was established by rule of the Arizona Supreme Court to assist that body in determining whether applicants are qualified to practice law in the state (Pet. App. A3). It has no authority other than that delegated to

conduct that furthers clearly articulated state policy. But the conduct alleged in the complaint (and admitted for purposes of the motion to dismiss) did not further—indeed, it was contrary to—the policy on bar admissions articulated by the state Supreme Court. Respondent alleged that the Committee had limited the number of applicants passing the Arizona bar examination in a manner completely unrelated to the articulated state policy of controlling lawyer competence. As this Court held in *City of Lafayette* and *City of Boulder*, however, state action immunity is not available to shield agency action that furthers no articulated state policy.¹⁷

a. Arizona's policy concerning the practice of law is clearly articulated in the Rules of the Arizona Supreme Court. Like other states, Arizona admits to its bar only those who are competent to practice law and who are of good moral character. Ariz. Sup. Ct. R. 28(c).¹⁸ To implement the policy articulated in its rules, the Supreme Court created the Committee on Examinations and Admissions. The Committee was directed to test applicants'

it by the state Supreme Court. Committee members are appointed by the Supreme Court on the recommendation of the bar's Board of Governors, and are responsible to the court, not the state bar (*ibid.*). The state bar itself is a "private entity to which all Arizona lawyers belong" (*id.* at A3-A4). See also *Hackin v. Lockwood*, 361 F.2d 499, 501 (9th Cir.), cert. denied, 385 U.S. 960 (1966) (the Committee is not a committee of the state bar).

¹⁷ *City of Lafayette* held that the state's authorization of a municipal utility monopoly did not confer state action immunity on anticompetitive conduct by the municipal monopolist that was not contemplated by the state. 435 U.S. at 414-415 (opinion of Brennan, J.), *id.* at 425 (opinion of the Chief Justice). *City of Boulder* held that a general grant of authority to a home rule municipality did not articulate any policy to displace competition that would be furthered by the municipality's cable television regulations. 455 U.S. at 54-56.

¹⁸ See, generally, *The Bar Examiners' Handbook* 16-23 (S. Duhl 2d ed. 1980). See also *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 233-234, 239 (1957).

knowledge of specified legal subjects and to recommend for admission "[a]ll applicants who receive a passing grade in the general examination * * * and who also receive a passing grade in Professional Responsibilities and who are found to be otherwise qualified under these Rules * * *." Ariz. Sup. Ct. R. 28(c) (VIII) (A).¹⁹

This case does not involve any challenge to that policy, or any contention that it has not been clearly articulated by the state. Respondent concedes (Br. in Opp. 10) that implementation of the state's decision to restrict the practice of law to those who demonstrate competence as measured by the bar examination necessarily restrains to some extent entry into the legal profession in Arizona. If respondent's complaint had merely alleged that the Committee tested for competence and thereby excluded some applicants,²⁰ it would properly have been dismissed in response to the state action defense.

What respondent in fact charged, though, was that the Committee reviewed the raw scores from the examination, and then selected a passing score that would "artificially reduc[e] the numbers of competing attorneys in the State of Arizona" (J.A. 11) in a manner that would *not* further the state Supreme Court's policy of separating competent from incompetent applicants. Instead of implementing state policy, he alleged, the Committee was acting contrary to state policy by "picking the number of applicants to be admitted by sheer manipulation of the raw scores which has no relationship to achievement" (Response to Defendants' Motion to Dismiss at 3).

¹⁹ This version of subsection VIII was in effect from Jan. 15, 1974 until June 15, 1976. See 110 Ariz. XXVII (1974); 113 Ariz. XXXVII (1976). Respondent incorrectly relies (Br. in Opp. 1-2) on the previous version of subsection VIII, which prescribed a passing grade of 70.

²⁰ Judge Ferguson may have read the complaint in this way. See Pet. App. A31. And the arguments of amici National Conference of Bar Examiners and the State Bar of California are based in large part on the erroneous assumption that this is all respondent challenged.

Petitioners do not dispute that no Arizona statute, rule, or court decision articulates a policy of limiting bar admissions on grounds unrelated to competence. On the contrary, decisions of the Arizona Supreme Court indicate a policy that bar applicants of reasonable competence and good character have a "right" to be admitted to the bar.²¹ Thus, assuming the truth of the allegation that petitioners imposed a restraint unrelated to competence, the court of appeals properly concluded that petitioners had not established a state action defense.

b. Though they do not dispute (for purposes of their motion to dismiss) either the allegations of the complaint or the lack of any state policy restricting bar admissions for reasons other than competence, petitioners claim that they are entitled to immunity because the Arizona Supreme Court has given them "some measure of discretion * * * to grade [bar] examinations" (Pet. Br. 59). Their contention seems to be that once a state has conferred on an agency the discretion to regulate competition for some purpose, any exercise of the agency's discretion is immune from antitrust scrutiny.

The court of appeals did not hold, however, and respondents does not argue, that immunity is forfeited be-

²¹ *In re Klahr*, 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967); *In re Ronwin*, 113 Ariz. at 358, 555 P.2d at 316; *In re Levine*, 97 Ariz. 88, 90-91, 397 P.2d 205, 206-207 (1964). See also *Baird v. State Bar of Arizona*, 401 U.S. 1, 8 (1971). Arizona's policy is consistent with that of other states. We are not aware of any state that has articulated a policy of limiting bar membership on grounds other than residence, experience, reasonable competence, and good character. See *The Bar Examiners' Handbook*, *supra*.

This is not to suggest that a state could not, if it chose, either (i) admit only "very highly" qualified applicants (*e.g.*, those who scored in the top ten percent on the bar examination) in order to create an elite bar, or (ii) protect the work opportunities or income of incumbent attorneys by limiting the number admitted each year. Had either of those policies (which go beyond assuring the reasonable competence and character of applicants) been articulated by the Supreme Court, the Committee would have been entitled to state action immunity in carrying it out.

cause of the way a state agency has exercised its discretion in carrying out state policy. It is not contended, for example, that the Commission has improperly decided what exam answers are right or wrong, or how many correct answers are a sufficient indication of competence. Rather, respondent claims that petitioners have decided an exogenous issue (how much competition the incumbent bar wishes), entirely outside the area of testing applicants for competence, and have simply raised the examination pass rate beyond what competence demands to effect the desired result. The mere fact that petitioners have at hand the means to effect such a restraint does not immunize their action if, as seems beyond dispute, the state Supreme Court has articulated no such policy. The same reasoning would apply to other licensing or health and safety requirements. Suppose, for example, that Arizona law required restaurants to meet minimal health and safety standards before they could get a permit to sell food to the public. A state agency charged with enforcing that requirement would not be entitled to immunize if it denied permits for reasons unrelated to health or safety in order to limit competition among restaurants.

Stated more generally, the petitioners' argument simply ignores the fact that a state policy to substitute regulation for competition in some area or aspect of a business does not entail an intent to displace competition in every aspect of that business. In *Goldfarb*, for example, Virginia had made its State Bar "the administrative agency through which the Virginia Supreme Court regulates the practice of law in that State" (421 U.S. at 776; footnote omitted). It had also granted the State Bar "the power to issue ethical opinions" (*id.* at 791), and in two such opinions the Bar had directed adherence to fee schedules. Notwithstanding the various other ways in which competition was limited in the market for legal services, this Court declined to immunize the bar's action because there was no clear indication that that particular restraint was

"compelled by direction of the State acting as a sovereign" (*ibid.*). Similarly, in both *Cantor* and *City of Lafayette* the state had articulated policies that limited competition in some utility activities, but not with respect to the particular conduct challenged.²² So here, by adopting a policy of restricting entry to applicants who are found to be competent and of good character, Arizona did not also adopt a policy of limiting the supply of lawyers in order to restrict the supply of legal services to its citizens, or to increase the price of those services. Indeed, restrictions on admission that are unrelated to competence or character would result in exclusion of some applicants who meet the state's standards, and would thereby frustrate the state's policy of admitting all those who satisfy the articulated criteria.²³

c. Petitioners argued in their petition (Pet. 15), though they have not pursued the matter further, that they satisfied *Midcal*'s first requirement by submitting their proposed grading formula to the state Supreme Court pursuant to Ariz. Sup. Ct. R. 28(c) (VII) (B). This contention was made in the court of appeals for the first time on petition for rehearing, and the court of appeals properly declined to consider it since the facts concerning the submission had not been presented to the district court (Pet. App. A9). If the Committee actually has limited admissions in a manner unrelated to competence (a fact assumed to be true for purposes of the motion to

²² Since *Cantor* involved restraints imposed by private parties, state contemplation of the alleged restraint would not have sufficed in any event to confer state action immunity. But that case, like *City of Lafayette* and *Goldfarb*, illustrates the point that a state may adopt a policy of restricting competition in an industry in some respects but not others.

²³ Petitioners' reliance on *Parker v. Brown* and *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992 (3d Cir. 1982), cert. denied, No. 82-501 (Nov. 15, 1982), is misplaced. In *Parker* there was no allegation that agency officials had acted contrary to state policy. And in *Euster* the court found that the agency action was in furtherance of state policy. 677 F.2d at 994-995.

dismiss), there is no indication of it in the submission respondent says the Committee made (Br. in Opp. App. A2). The alleged restraint was not brought to the Supreme Court's attention. Thus mere review of and acquiescence in the Committee's action is insufficient to satisfy *Midcal*'s requirement that state policy to displace competition with its own system of regulation must be "clearly articulated and affirmatively expressed." *Midcal*, 445 U.S. at 105. As a general matter, legislative silence (or, in this case, inaction by the state supreme court) gives no clear idea about the boundaries of the area the state has undertaken to regulate. Moreover, the state's failure to react to agency conduct, like the state's failure to act in the first instance, may indicate nothing more than the absence of a consensus, a preoccupation with more pressing matters, or an indifference as to either of two contrary choices. Thus the fact that the Arizona Supreme Court may have reviewed the Committee's grading scheme cannot be taken as tacit approval of a new policy to refuse admission to competent applicants, in order to protect the trade of incumbent members of the bar.

Nor is it significant for purposes of *Midcal*'s first requirement that the state Supreme Court may on occasion review complaints lodged by unsuccessful applicants (see Pet. Br. 70-74).²⁴ Like review of grading procedures, review of admission denials lacks the sovereign initiative and clarity of purpose necessary to satisfy the requirements of *affirmative* expression and *clear* articulation.²⁵

2. a. The National Conference of Bar Examiners ("NCBE") (Br. 5-14) contends, as did Judge Ferguson

²⁴ Petitioners argue, correctly, we believe, that this fact is relevant to *Midcal*'s second requirement (*ibid.*). See also NCBE Br. 27. They do not contend that it satisfies the first.

²⁵ Moreover, under the Arizona Supreme Court Rules, the Committee may be able to prevent complaints about the grading of exams from reaching the state Supreme Court. Rule 28(c)(XII)(G)(5) allows the filing of a petition with the Court only if three members of the Committee dissent in writing from a decision about grading.

in the court of appeals (Pet. App. A19-A26), that allowing a Sherman Act suit against the Committee members for conduct related to the bar examination undermines Arizona's right to regulate admission to its bar. We disagree.

This Court has recognized that denying absolute Sherman Act immunity to subordinate state instrumentalities may impose some burdens on them. But it has rejected the argument that such burdens require an expansion of the state action doctrine:

[T]his argument is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws. * * * [J]udicial enforcement of Congress' will regarding the state-action exemption renders a State "no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anti-competitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws."

City of Boulder, 455 U.S. at 56-57, quoting *City of Lafayette*, 435 U.S. at 416. Accordingly, before a Sherman Act complaint against a subordinate state instrumentality can be dismissed on state action grounds, the court must determine that its conduct was in furtherance of state policy, and thus attributable to the state.²⁶

This standard applies with equal force to an agency that controls state bar admissions. The state has an undeniable interest in regulating its bar; and state court orders regarding admissions, discipline, and disbarment must be given deference. *District of Columbia Court of Appeals v. Feldman*, No. 81-1335 (Mar. 23, 1983), slip op. 22 n.16. But such deference is due only to conduct

²⁶ Alternatively, of course, the complaint could be dismissed if the alleged conduct—even if not immune—would not violate the antitrust laws. Petitioners have made no such argument here.

that furthers policies adopted by the state legislature or supreme court. Indeed, where, as here, the state agency is a self-regulatory group composed of members of the regulated profession, there is an increased risk that its actions may be designed to further private objectives rather than those of the state.

b. NCBE also argues (NCBE Br. 12-14) that *District of Columbia Court of Appeals v. Feldman*, *supra*, requires dismissal of respondent's complaint.²⁷ *Feldman* held that the federal district courts have no jurisdiction to review action taken by the highest state (or District of Columbia) court on individual admissions application.²⁸ Because such decisions are judicial in nature, *Feldman* concluded, review is available only in this Court under 28 U.S.C. 1257. Slip op. 14-20. (The Court pointed out, however, that the district courts have jurisdiction to consider "general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do not require review of a final state court judgment in a particular case" (*id.* at 24).)

This case, though it involves an allegation of injury to an individual applicant, entails none of the jurisdictional difficulties present in *Feldman*. In the first place, there is here no claim of error or improper action by the state supreme court.²⁹ On the contrary, the complaint alleges that the members of the Committee violated the Sherman Act by limiting admissions in a way not authorized by the Arizona Supreme Court.³⁰

²⁷ Petitioners made a similar argument in their petition (Pet. 5-8) and filed a supplemental brief on the effect of *Feldman*. They have not pursued this argument in their brief on the merits.

²⁸ Indeed respondent sought, and was denied, review in this Court under 28 U.S.C. 1257 of the Arizona Supreme Court's decision. *Ronwin v. Committee on Examinations and Admissions*, 419 U.S. 967 (1974).

²⁹ Nor, in our view, would it be correct to argue that an attack on the Committee's action implicitly impugns the state Supreme Court's later decision sustaining the Committee's recommendation in re-

Second, the relief sought here, unlike that in *Feldman*, is not a reversal of the state Supreme Court's denial of admission to the bar.³⁰ Instead, respondent seeks money damages—a remedy the Supreme Court would have been unable to afford on review of his earlier petition. Finally, quite apart from the nature of the parties and of the relief sought, respondent's claim here was brought under Section 4 of the Clayton Act (15 U.S.C. 15), and sought treble damages for a violation of Section 1 of the Sherman Act (15 U.S.C. 1). Jurisdiction over antitrust claims lies exclusively in the federal courts. See *General Investment Co. v. Lake Shore Ry.*, 260 U.S. 261, 287 (1922); *Feldman v. Gardner*, 661 F.2d 1295, 1303 (D.C. Cir. 1981), cert. denied, No. 81-1526 (June 28, 1982). The fact that respondent sought review of the denial of his admission in the state supreme court—the only place where it was

spondent's case. The state court simply denied respondent's petition without opinion—a disposition that does not indicate approval of the action alleged in the complaint here. (The court later characterized respondent's action as a "petition for review of the grading of [his] examination papers," *In re Ronwin*, 113 Ariz. at 357, 555 P.2d at 315, a suit that would have been procedurally defective under Ariz. Sup. Ct. R. 28(c) (XII) (G) (5) unless three members of the Committee stated that the papers had been unfairly graded.)

³⁰ If on remand respondent were to establish an antitrust violation, he would still have to prove resultant damage, i.e., that he would have passed the bar examination under a competence-based grading system (and satisfied the other prerequisites for admission). In ascertaining damages, however, the district court would not have to regrade respondent's exam or overrule any decision of the Arizona Supreme Court. If, after proving the arbitrariness of the Committee's grading policy, respondent established that his raw score would have been converted to a passing score by any reasonable conversion methodology, the district court could assume that he would have been admitted to the bar, in the absence of proof by the defendants of other grounds for disqualification. Of course, respondent would still have to prove that his earnings would have been greater during the period he would have been eligible to practice law than his actual earnings during the period, and the amount of the loss he suffered.

available—cannot deprive him of the right to present his antitrust claim to a federal forum. Federalism is, after all, a two-way street.

II. ON REMAND, THE ORDINARY RULES OF CIVIL PROCEDURE WILL AFFORD AMPLE PROTECTION TO THE STATE'S INTEREST IN CONFERRING DISCRETION ON THE AGENCY CHARGED WITH DETERMINING THE COMPETENCE OF APPLICANTS FOR BAR ADMISSION

Our conclusion that the complaint in this case was improperly dismissed is not intended to suggest that the courts should give little deference to the state's interest in using administrative agencies to carry out its public policies, or to its equally strong interest in licensing and regulating the activities of the bar. We urge only that the rules of pleading prescribed by the Federal Rules of Civil Procedure are to be interpreted in the same way in antitrust actions as in other suits, and that in its present posture this case is governed by the principle that for purposes of a motion to dismiss under Rule 12(b)(6) all the allegations of a complaint are to be taken as true. *City of Lafayette*, 435 U.S. at 403; *Control Data Corp. v. International Business Machines Corp.*, 421 F.2d 323, 326 (8th Cir. 1970); *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957) (Clark, J.); 5 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1221, 1228 (1969). That principle does not mean that unfounded actions cannot still be dismissed at an early stage.

1. As the court of appeals indicated, the district court should not hesitate to grant summary judgment for petitioners if uncontroverted facts show that the challenged grading procedure was in furtherance of state policy (Pet. App. A18 n.12). Here it is undisputed that Arizona's Supreme Court has articulated a policy of limiting bar admissions to reasonably competent applicants. It also contemplates use of written examinations covering

certain subjects to determine competence; its rules so provide. Ariz. Sup. Ct. R. 28(c) (VII) and (VIII). Having prescribed both the restrictive policy and the examination system, the Court delegated to the Committee the essentially technical tasks of designing the examination and deciding what raw score represents reasonable competence. The Court obviously contemplated that the Committee would exercise some discretion in carrying out its duties; a variety of possible examinations and grading systems could reasonably be expected to serve the state's purpose of determining competence. Indeed, the Court's rules provide that "[t]he Committee may utilize the Multi-State Bar Examination * * * and may utilize such grading or scoring system as the Committee deems appropriate in its discretion." Ariz. Sup. Ct. R. 28(c) (VII) (A). If the district court finds that the grading method used by the Committee was in furtherance of the state policy of limiting entry on the basis of competence, it must hold that the conduct at issue constitutes state action.³¹

Moreover, where the state has clearly indicated its intent to displace competition with state control over some

³¹ Respondent's challenge to the grading procedure is directed primarily at the selection of a passing raw score after, rather than before, the examinations have been graded and raw scores computed (J.A. 10). The record does not reveal exactly how examination scores were determined, but what respondent alleges to be a scoring system unrelated to competence may be merely a way of standardizing raw scores to account for unavoidable differences in examination difficulty from year to year. See *The Bar Examiners' Handbook*, *supra*, at 61-62, 65-70. The Committee could thus show that it uses a standardization procedure to implement the state policy of testing for competence, and that it is consequently entitled to state action immunity. The district court should not second-guess the Committee's exercise of the discretion afforded it by trying to determine whether the Committee used the "best" grading system or selected a passing score that would "most accurately" measure competence in order to decide the state action question. Even an inaccurate or erroneous exercise of state action is within the immunity.

part of a business, and the only issue is whether an agency has acted in furtherance of that policy, a finding that agency action furthers state policy as an objective matter should preclude inquiry into subjective intent. If the district court concludes that the Committee's grading method was a reasonable way to measure competence, it should not inquire whether the members (in order to promote their private interests) chose a grading method that, while reasonable, was more restrictive than necessary to further the state's policy. The restraint on competition thereby imposed would clearly be within the state's authorization, and the motives of the Committee members in imposing it would be no more relevant a subject of judicial scrutiny than the motives of members of the state legislature or Supreme Court in authorizing the restraint.

In deciding the factual question whether the Committee's grading system furthers state policy, the district court should also give considerable deference to, and may find determinative, any available evidence of the Arizona Supreme Court's own review of the Committee's actions.³² If the Committee shows, for example, that its grading method was submitted to and approved by the state Supreme Court, this would be strong evidence that the court believed it furthered the articulated state policy

³² This factual issue should not be confused with the legal question about what the state's policy is. As this Court has made clear, the state's policy to displace competition with its own system of regulation must be "clearly articulated and affirmatively expressed." *Midcal*, 445 U.S. at 105. And whether the policy has been announced "affirmatively" and with sufficient clarity is a matter of federal law. *City of Boulder*, 455 U.S. at 52 n.15. Mere review and acquiescence in agency action is insufficient to satisfy those requirements. See pages 21-22, *supra*. On the other hand, the fact that the court has reviewed the Committee's practices is evidence relevant to the factual question whether its approach to grading furthers the policy—already clearly stated—of controlling competence. The state Supreme Court is, after all, far more familiar than a federal district court would be with the Committee's operations, and with the requisite standards of proficiency for the practice of law in Arizona state courts.

of controlling competence. So would a showing that the Court dismissed respondent's petition because it believed the challenged grading system was consistent with the state's standards.³³ Any other cases in which the Court rejected similar challenges would also be relevant.

2. The district court should also consider whether the rules of issue preclusion prevent respondent from arguing that the Committee's grading system frustrates established state policy, since the Arizona Supreme Court dismissed his earlier petition challenging the grading system. In their answer in this case the Committee members raised the affirmative defense of *res judicata* which, construed broadly, includes issue preclusion as well as claim preclusion. *Allen v. McCurry*, 449 U.S. 90, 94 n.5 (1980).³⁴ Since the earlier state proceeding involved "[a] claim of a present right to admission to the bar of a state and a denial of that right" (*District of Columbia Court of Appeals v. Feldman*, slip op. 17, quoting *In re Summers*, 325 U.S. 561, 568 (1945)), it was a "judicial proceeding" which is entitled to full faith and credit in a federal court. 28 U.S.C. 1738. Accordingly, if the issue whether the Committee's grading system furthered state policy was actually determined against respondent in that proceeding, and if the other requirements for issue preclusion are satisfied, the same factual question may not be relitigated in this antitrust proceeding.³⁵

³³ But see note 29, *supra*.

³⁴ Because it dismissed the complaint on other grounds (Pet. App. A36), the district court has not yet ruled on the availability of a preclusion defense.

³⁵ The broader rule of claim preclusion would not apply here, since respondent's Sherman Act damage claim could not have been litigated in state court. See page 25, *supra*. Even judgments under state antitrust laws are generally held not to preclude subsequent actions under the federal antitrust laws. *Hayes v. Solomon*, 597 F.2d 958, 984 (5th Cir. 1979), cert. denied, 444 U.S. 1078 (1980); *Kurek v. Pleasure Driveway & Park District of Peoria*, 583 F.2d 378, 379 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979);

As this Court recently noted, application of preclusion rules in the federal courts where there has been a prior state judicial proceeding serves "to 'promote the comity between state and federal courts that has been recognized as a bulwark of the federal system.'" *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 467 n.6 (1982), quoting *Allen v. McCurry*, 449 U.S. at 96. Such comity is particularly important when the prior decision involves admission to the state bar. The reasons this Court has recognized for minimizing federal court interference in the actions of a state judicial system relating to the membership of the state bar render inappropriate relitigation in a Sherman Act damage action of issues either determined adversely to disappointed bar applicants in state judicial proceedings or "inextricably intertwined" in such proceedings. *Feldman*, slip op. 25.

* * * * *

In sum, while the court of appeals correctly concluded that dismissal on state action grounds was not warranted at this stage of the litigation, proper application of the state action doctrine in this case will neither impair the ability of states to delegate to subordinate agencies discretion in carrying out state policy nor impose antitrust liabilities on the members of those agencies for actions in furtherance of state policy.³⁶

see also Restatement (Second) of Judgments § 26 comment c, illustration 2 (1982). But cf. *Nash County Bd. of Education v. Biltmore Co.*, 640 F.2d 484 (4th Cir.), cert. denied, 454 U.S. 878 (1981).

In applying the rules of issues preclusion, the district court will first have to determine whether the consistency of the grading system with state policy was a matter actually decided in the state court proceeding. See *Russell v. Place*, 94 U.S. 606, 608 (1876). Since no hearing was held on respondent's application, there may also be a question whether the procedure employed in passing on the petition was adequate to warrant precluding relitigation. See Restatement (Second) of Judgments § 28(3).

³⁶ Petitioners also assert that this case presents the question whether the Committee's grading of the bar examination and its recommendations to the Arizona Supreme Court were immune from the Sherman Act under the *Noerr-Pennington* doctrine. See *Eastern*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

LAWRENCE G. WALLACE
*Acting Solicitor General **

WILLIAM F. BAXTER
Assistant Attorney General

JOHN H. GARVEY
Assistant to the Solicitor General

BARRY GROSSMAN
NANCY C. GARRISON

WILLIAM J. ROBERTS
Attorneys

OCTOBER 1983

Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). But petitioners did not raise this issue in the lower courts (Pet. 18 n.9), nor was it passed on by the court of appeals. It is therefore not properly before this Court. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the anticompetitive agreement among the Committee members alleged by respondent is not only contrary to existing state policy (see page 19, *supra*), but apparently also unknown to the state Supreme Court—whose actions petitioners are purportedly attempting to influence. See Pet. App. A9. If it could be proved that the Committee in fact smuggled by the Supreme Court a protective quota on admissions in the guise of competence-related recommendations, such a sham would not be entitled to protection of the *Noerr-Pennington* doctrine. See *California Transport v. Trucking Unlimited*, 404 U.S. 508, 512-513 (1972); cf. *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972); *Harman v. Valley National Bank*, 339 F.2d 564 (9th Cir. 1964). We doubt in any event whether the *Noerr-Pennington* doctrine would apply to the exercise of authority delegated by a state, particularly where—though it is phrased in the form of a recommendation—the authority is effectively final. Such an extension of *Noerr-Pennington* is not needed to secure the “‘right of petition * * * protected by the Bill of Rights,’” which this Court has found to underlie the doctrine. See *California Transport*, 404 U.S. at 510.

* The Solicitor General is disqualified in this case.

No. 92-1474-CFR
Status: GRANTED

Title: Charles R. Hoover, et al., Petitioners
V.
Edward Rowan

Docketed:
March 2, 1983

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Hoover, Charles R.

Counsel for respondent: Rowan, Edward; Von Arden, Phillip S.

Entry	Date	Note	Proceedings and Orders
1	Mar 2 1983	0	Petition for writ of certiorari filed.
2	Mar 24 1983		Brief of respondent Edward Rowan in opposition filed.
3	Apr 4 1983	0	Motion of National Conference of Bar Examiners for leave to file a brief as amicus curiae filed.
4	Apr 25 1983		Supplemental brief of petitioners Charles R. Hoover, et al. filed.
5	Apr 27 1983		DISTRICT CO. May 10, 1983
7	Apr 28 1983	x	Brief of respondent in opposition to petitioners supplemental brief filed.
8	May 16 1983		Motion of National Conference of Bar Examiners for leave to file a brief as amicus curiae GRANTED. Justice O'Connor OUT.
9	May 16 1983		Petition GRANTED. Justice O'Connor OUT. *****
11	Jun 20 1983		Order extending time to file response to petition until August 15, 1983.
12	Aug 16 1983	0	Motion of National Conference of Bar Examiners for leave to file a brief as amicus curiae filed.
14	Aug 17 1983		Brief of petitioners Charles R. Hoover, et al. filed.
15	Aug 17 1983		Brief of respondents State Bar of Arizona, et al. in support of petition filed.
16	Aug 19 1983	0	Motion of State Bar of California for leave to file a brief as amicus curiae filed.
19	Aug 24 1983		Opposition of Edward Rowan to motion of State Bar of California for leave to file a brief as amicus curiae filed.
20	Aug 17 1983		Joint appendix filed.
22	Aug 23 1983		Order extending time to file response to petition until October 31, 1983.
23	Sep 5 1983	0	Motion of Maryland for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
24	Sep 6 1983		Amicus curiae (Nat'l. Conf. of Bar Examiners) response to opposition to the motion for leave to file AC brief.
25	Sep 9 1983		Response of petitioners to motion of Attorney General/Maryland for leave to participate in oral argument filed.
26	Sep 23 1983		Record filed.
27	Sep 23 1983		Certified original record of C.A. proceedings, 3 volumes received.
29	Oct 3 1983		Motion of National Conference of Bar Examiners for leave to file a brief as amicus curiae GRANTED. Justice

Entry	Date	Note	Proceedings and Orders
29	Oct 3 1983	O'Connor OUT. Motion of State Bar of California for leave to file a brief as amicus curiae submitted. Justice O'Connor OUT.	
30	Oct 18 1983	Motion of respondent Eugene Bonifant filed.	
31	Oct 28 1983	Brief amicus curiae of United States filed.	
32	Oct 31 1983	Brief amicus curiae of Colorado et al. filed.	
33	Nov 14 1983	Motion of Maryland for leave to participate in oral argument as amicus. Justice O'Connor OUT.	
34	Nov 16 1983	Circulated.	
35	Nov 17 1983	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.	
36	Nov 17 1983	Motion of Maryland et al. for leave to participate in oral argument as amicus curiae and for divided argument filed.	
40	Nov 23 1983	Motion of the Solicitor General for leave to participate in oral argument, and fifteen minutes of respondent's time for oral argument is allotted for that purpose. Justice O'Connor OUT.	
41	Nov 26 1983	Motion of Maryland et al. for leave to participate in oral argument. Justice O'Connor OUT.	
42	Nov 26 1983	Oral argument. Monday, January 16, 1984. (see case)	
43	Dec 3 1983	Motion of respondent for reconsideration of order granting amicus curiae submitted. Filed.	
44	Dec 12 1983	Motion of respondent for reconsideration of order granting divided argument submitted. Justice O'Connor OUT.	
45	Jan 4 1984	Justice O'Connor submitted brief in this case.	
46	Jan 5 1984	Motion of respondent for reconsideration of order granting divided argument submitted. Filed.	
47	Jan 11 1984	Motion of respondent for reconsideration of order granting divided argument submitted. Filed.	
48	Jan 16 1984	Motion of respondent for reconsideration of order granting divided argument submitted. Filed.	